EQUITY CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH-CAROLINA.

JUNE TERM, 1830.

Henry N. Jasper, adm'r of Sarah M. Jasper
v.
James Maxwell, ex'r of Stephen Outerbridge,
} From Franklin.

Equity always compels the trustee to surrender the legal estate to the *cestui que trust*, unless the receipt of the profits by the trustee is necessary to effectuate the intention of the creator of the trust.

Where a testator bequeathed bank stock to his executrix, in trust, to pay the dividends to his daughter for life, and upon the expiration of the charter of the bank, gave the same shares absolutely to his daughter without any limitation over—*held*, that the daughter took the stock absolutely, and that her administrator had a right to call for a transfer of it.

Where a husband received with his wife a large personal estate in possession during the coverture, and induced her to join him in a conveyance of her land to a third person, who reconveyed it to the husband, and the conveyance and reconveyance were only designed to vest the fee in the husband—*held*, upon a bill filed by the husband as administrator of his wife, to recover chattels of which she was the *cestui que trust*, that the children of the wife by a former marriage had no equity to prevent his obtaining the legal title to those chattels.

The Plaintiff alleged, that the Defendant's testator had in his will bequeathed as follows:

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"Whereas I have fifty shares in the State Bank of North-Carolina, "&c. (setting forth shares in other banks, amounting in all to seventy-"six) it is my will, that my daughter *Sarah M. Fenner* shall have "the profits arising therefrom during her natural life, or until the "charters of said banks may expire. I do therefore, by these pre-"sents, leave the said seventy six shares, in trust, with my execu-"tors, and I do hereby authorize them to take charge of the said bank "stock, and draw the dividends as they shall become due and paya-"ble; and the said dividends, when drawn by my executors, shall be "paid over to my daughter, the said S. M. F. for her use and com-"fort. Whenever the charters of the said banks shall expire (if they "shall not again be renewed) I do then give and bequeath the said "seventy-six shares to my said daughter S. M. F. to her and her heirs "forever."

The Plaintiff then averred, that the Defendant proved the will—that he, the Plaintiff, and the said S. M. F. had intermarried; that the Defendant, before the marriage, had regularly paid the dividends upon the stock to S. M. F. and since that event to himself—that S. M. F. was dead, and that letters of administration upon her estate had issued to him. The prayer of the bill was, that the stock might be transferred to the Plaintiff.

The Defendant in his answer admitted every fact charged in the bill; but, as matter of defence, stated, that S. M. F. was a widow at the death of his testator, and had children who were infants—that under the will of her father, she had received, in addition to the stock above mentioned, a very large personal estate, all of which the Plaintiff had received—that her father had also devised to her in fee-simple a valuable real estate—that there was no issue of the marriage between her and the Plaintiff, and that soon after the marriage, the Plaintiff had prevailed upon her to join him in a conveyance of her land to a third person, who, according to a previous concert, had re-conveyed it in fee-simple to the Plaintiff—that the conveyance of the Plaintiff and his wife, and the re-conveyance to the Plaintiff, were without consideration, the only object being to assure the land to the Plaintiff in fee-simple absolute, to the injury of the children of his

wife by her first marriage, to whom the Defendant insisted, that in equity and justice, they ought to descend. June, 1830. Jasper v. Maxwell.

The cause was heard upon bill and answer.

Badger, for the Plaintiff.

Seawell, for the Defendant.

RUFFIN, Judge.—The question made upon the will has no difficulty. The bank stock is bequeathed to the executors, in trust to receive the dividends as declared, and pay them over to the testator's daughter during her life, or until the charters expire, and upon that event, unless the charters be renewed, the stock itself is given to the daughter. In her then are united the present right to the whole profits, and the absolute ultimate dominion—which gives as perfect a property as is known to the law. The *cestui que trust* can call for the legal estate at her will. It is not like the case of a bequest in trust for the *maintenance* of another. There the trustee must retain the property, in order to provide out of the profits for the support of the object of the testator's bounty. He must keep the fund in his own hands, lest it be wasted. But here the fund is to go (eventually) directly to the daughter, and in the mean while, the whole profits, not *as* a maintenance to be provided by the executor, but as a general pecuniary legacy. The only purpose of the testator seems to have been, to save his daughter the trouble of receiving the dividends personally at the bank, and to give his advice to her to keep that fund in stock, as long as she could, in preference to vesting it otherwise. But whether that was his intention or not, such is necessarily the construction; for the law will not permit a testator to pass the absolute property, and then fetter it, without a limitation over, with restrictions inconsistent with the general ownership created by him. It is one of the first rules of a trust, that the *cestui que trust* can call on the trustee in this Court for the legal estate.

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It would give the Court much satisfaction, if an equity could be raised on the other point made in the answer; and it is well worthy the consideration of the Legislature. The truth is, that by an undue influence, which every husband, either by blandishment or harshness, can exercise over a wife, she may be induced, and most of them are induced, indirectly, to convey their estates to their husbands, in the method practised here. But what can the Court do? It is a legal conveyance of a legal estate, supported by the statute. If not, let it be contested at law, and each party there make the most of his case. But if it be, where is the equity we can go on here? Both the husband and the children are volunteers, and the first in time is best off. Certainly if the deed were defective, Equity would not raise a finger to help it. But if it be valid in law, we are kept equally still; for there is no consideration to set us in motion. If the estate were a mere equity, we would gladly interpose; for our power would be exercised in the protection, and not in the restriction of the wife.

PER CURIAM.—Let a decree be entered according to the prayer of the bill.

John Mardre et al.
v.
Richard Leigh et al.
} From Perquimons.

Where the Plaintiff charged that the Defendant held slaves as his trustee, and prayed an account of the profits, and that the possession might be surrendered to him, and the Defendant denied the trust, and insisted that he had held possession twenty-six years adversely to the right of the Plaintiff, and there was no proof of the trust—*held*, even if the Court had jurisdiction for a discovery or an account, that as the possession of the Defendant was a bar to an action at law—by analogy, it was a bar to the relief.

This was an appeal from a decree dismissing the bill, pronounced in the Court below, by his Honor Judge MANGUM. The bill charged that the Defendant *Leigh*

intermarried with *Charlotte Spruill*, in 1794, and that in 1795, her father *Hezekiah Spruill* placed in *Leigh's* possession a female slave, named *Esther*, in trust, for such of *Leigh's* children, as *Spruill* should afterwards nominate as donees by his will—that *Mrs. Leigh* died before her father, who made his will in 1802, and died; and that by the will, the negro and her increase were bequeathed to *Leigh's* four daughters, *Elizabeth*, *Charlotte*, *Sarah* and *Louisa*, with cross remainders between them, upon the death of either under age and without having issue: that the Defendant and his children resided together, and that he kept the negroes for their use, until the marriage of the daughters *Sarah* and *Louisa*, in 1825, when he refused to deliver them over: that *Elizabeth* died in 1805, at ten years of age: that *Louisa* and *Sarah* died covert in 1827, and that the Plaintiffs, their surviving husbands, had obtained administration of their estates: that the other daughter, *Charlotte*, intermarried with *Ephraim Mann*, in 1826. The bill was filed in 1828, against *Leigh* and *Mann* and his wife, for *Esther* and her increase. The Defendant, in his answer, admitted his marriage in December, 1794, and that *Esther* was put into his possession by his father-in-law in February, 1795, when the negro was sent home with his wife. He denies positively, that it was upon any trust or express loan; and says, nothing was said of the terms, from which he concluded, that it was an advancement to his wife. He averred, that nothing to the contrary was said during *Spruill's* life; and that the first intimation he had, that the gift to him was not considered by his father-in-law as absolute, was in the will: that nevertheless he, the Defendant, claimed the property absolutely, and made that claim known to his daughters, and to *Spruill's* executor, and in the neighbourhood generally: that the executor never made any demand, nor did his daughters, though each of them was more than twenty-four years old at her marriage; and he relied upon his adverse pos-

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session, and the statute of limitations, as against the executors and his daughters.

The proof fully sustained the Defendant as to the period of his acquiring the possession, and its nature. Many witnesses proved clearly, that he asserted in his family and the neighbourhood, for more than thirty years, his ownership; and that his daughters were all of the ages stated in the answer, at the time of their marriage. A single witness deposed, that the negro was originally lent. She was a daughter of the testator *Spruill*. She did not say, that she heard any thing pass between her father and the Defendant, on the subject of this negro. But she often heard her father say, that he never would give his children any property during his own life; and that she had heard *Leigh* say, shortly after his wife died, that the negro was lent to him. There was no testimony to the particular trust alleged in the bill, viz. that the Defendant had kept the negroes for his daughters.

The case was argued by *Kinney* for the Plaintiffs, and by *Hogg* for the Defendants.

RUFFIN, Judge.—I need not refer to the cases which establish the principle, that when a father, before 1806, put into the possession of his child upon marriage, a slave, it was a gift, unless the contrary expressly appear. They are numerous and familiar. Upon the face of this case therefore, there was a gift. It is insisted, however, that the contrary is expressly proved here. That proof is by no means satisfactory. It does not go to any specific terms, upon which the possession was gained, as coming directly within the knowledge of the witness at the time. It is only by inference from the general declarations of the father, and from those of *Leigh*, made shortly after his wife died. The former are not competent to determine the character of the transaction. The latter might be easily misunderstood. It is extremely probable, that the Defendant might have said,

that he considered the negroes his childrens'. As they came by their mother, he might, in conscience, have felt bound to bestow them upon her issue, in preference to any others he might have by a subsequent marriage. In that sense, he might have made the declaration proved. His answer cannot, therefore, be overruled by a single witness, whose testimony is of so uncertain a character. But it is insisted, that she is supported by the answer; because *Leigh* does not swear to an express gift. My inference is directly the contrary. The answer states what is in law a gift; and denies an express loan. This is much stronger with me, than if the Defendant had stated an express gift. It argues, that he has told the exact truth. If he had not, he would, at once, have come out with such a gift. The material part is the denial of the loan, which is positive. Upon the proofs therefore, there was a gift to the Defendant.

But if this were not so, and the negro was loaned, and not given, yet the Plaintiff could not get a decree. The particular trust alleged wholly fails, upon the evidence. We hear nothing of it, but in the bill. Taking it to be a loan by *Spruill* indefinitely, there is relief at law, by an action of *detinue* by the executor; or if he assented to the legacy, by the daughters. But if this Court could take jurisdiction, upon any principle of discovery or profits, the character of the Defendant's possession, being expressly adverse to the executors and legatees of *Spruill* for twenty-six years, would bar the action at law, and so, by analogy, bars relief in this Court.

PER CURIAM.—Let the decree below be affirmed.

June, 1832.

Johnson v. Person.

William Johnson & Martha his wife, v. William Person, adm'r. of Thomas Person, the elder, and Thomas Person, the younger. } From Franklin.

Where a replication is taken to an answer, the answer is not evidence unless responsive to the bill—therefore, where the Plaintiff charged one assignment, and the Defendant denied that, and set up another, and no proofs were taken—*held*, that the case was to be considered without reference to either.

An administrator Defendant who denies the right of the Plaintiff, and neither renders an account, nor pays money into court, is chargeable with interest from the time the Plaintiff's right accrued.

Where an estate is charged with the education of children, and a near relative takes that charge upon himself, upon an account between the children, he is to be taken as having intended a benefit to the estate, and not a personal bounty to the children.

A reference to the Master to take an account need not be renewed at every term between the order and the report.

If a party to a bill for an account resides out of the State, and has no known agent to attend to the suit, it is proper to serve notice of taking the account upon his Counsel in this Court.

The Plaintiffs alleged, that *William Person*, the elder, died in the year 1778, leaving a widow and five children, of whom the Plaintiff *Martha* was the eldest: that by his will, he gave the residue of his estate, after the payment of his debts, to his widow for life, but charged it with the maintenance and education of his four younger children, viz. the Defendants and two others, *Mary* and *Benjamin*, who were dead without issue—that the widow of *William*, the elder, proved his will, and died in 1818, and that *Samuel Johnson*, who was made a Defendant, had taken out letters of administration, *cum testamento annexo* of the testator. That *Thomas Person*, the elder, the brother of *William*, the elder, owed the latter a large debt, which never was settled until the death of *Thomas*: that upon his death, the Defendant *William*, the younger,

had taken out letters of administration upon his estate: that in the year 1804, the Defendant *William*, the elder, by arbitration, settled with his mother, the executrix of his father, and there was found to be due the latter, from *Thomas Person*, the elder, the sum of £859: that the mother consenting that this sum should be paid to her children then living, the award was made to them, viz. to all but *Mary*, who had died some time before: that the Defendant *William*, as the administrator of *Thomas Person*, the elder, had never paid the amount due upon the award, but had used the money thus due, and had possession of the award, or that it was lost—so that the Plaintiffs could not recover at law. The prayer was, that one-fourth of the award, with interest, might be paid to the Plaintiffs.

The Defendant *William*, in his answer, admitted the debt, the arbitration and the award; but he insisted, that his mother was liable for the expense of educating the four youngest children, which she had never defrayed, it having been borne by his intestate *Thomas*, the elder. That, in consideration of this liability to the four younger children, the mother had relinquished to them the whole of that debt, which was not more than a reasonable compensation for the nurture and education charged upon the residue bequeathed to her—that to induce the mother to do this, he had paid her £150. The Defendant denied that the Plaintiffs were entitled to any part of the £859, and averred that he had paid the Defendant *Thomas*, the younger, and the husband of *Mary*, their share thereof. It was in proof, that the intestate *Thomas*, the elder, had paid all the expenses of educating the three sons of his brother. It did not appear how much had been expended upon the education of *Mary*, but it was proved that she had married respectably.

No proof of any payments by the Defendant *William*, as alleged by him, was offered.

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It appeared from the record of the cause, that the order of reference had been made at a former term, and that it was not renewed at the term immediately preceding that to which the report was returned. The Master, in his report, stated, that as the Defendant *William*, the younger, was a resident of another State, he had served notices of the time and place of taking the account upon his Counsel in this Court.

Exceptions were filed to this report by the Defendant *William*.

1st. Because the Master had not allowed the Defendant the sum of £150 paid the mother.

2d. Because he had not charged the fund with the expenses of nurturing and educating the four youngest children.

3d. Because interest had been computed from a period before the bill was filed, viz. from the year 1804.

4th. Because the order of reference was not renewed at the last term.

5th. Because notice of the time and place of taking the account had not been personally served upon him.

Badger & W. H. Haywood, for the Plaintiffs.

Seawell, for the administrator of *Thomas Person*.

RUFFIN, Judge, after stating the case as above, proceeded as follows: Upon the will, any residue remaining at the death of the widow, is clearly divisible amongst the surviving children equally. Up to that event, the profits belonged to the widow, and the whole was subject to the charge of educating the younger children. But the report is predicated on a false basis, the award and transfer of the debt by the mother. There is no evidence of such a transfer. The Plaintiffs allege one to *all the children* then living. This is expressly denied by the Defendant *William*; and the Plaintiff has taken no proof. That Defendant admits, or insists on a different assignment, namely, one to the four children, excluding *Mar-*

tion, and says that he paid £150 for it. Of this the Defendant has offered no proof; and being a new and distinct allegation, his answer to this point is not evidence. It is only evidence, when responsive to the bill. It is not like one charging and discharging himself in the same breath, and from the same fact, standing as one admission. It is a denial of the Plaintiff's allegation, and then bringing forward a new fact, as a title in himself. There being no proper proof of any assignment, both are laid out of the case; which must be left to stand on the will. By that, it is declared by the Court, that the Plaintiff, in the case which has happened, is entitled to one-third of the sum of £857. Consequently, the first exception is overruled. Then, as to the interest: it is to be observed, that the Defendant does not say, that he has not used the money; and he does not bring it into Court, and render an account. On the contrary, he denies the Plaintiffs' right altogether. Under such circumstances, he is chargeable with interest from the time the legacy became due to the Plaintiffs; that is, from the death of their mother. To that extent, the third exception is allowed; and overruled for the balance.

The second exception goes to the charge of education. That was certainly to be defrayed out of this fund. But when a near relative, and the head of the family, takes the charge on his own private purse, it must be held to be for the benefit of the whole estate, and not restricted to be a personal bounty to particular children. It is most probable, that the understanding of the parties was, that this very debt of *General Person* should be paid in that way. If so, it was a most unpardonable and unconscientious advantage taken of his estate, to claim it after his death. But it is too late to consider that now. It has been settled, without any deductions for his disbursements for his nephews. How can his nephews ask now, that the allowance, instead of being made to him, should be given over to them? But if this were not so, it is plain that the expenses, contemplated by the testa-

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tor in 1778, would not have exceeded the income from the estate. The tenant for life was therefore responsible, and the profits accruing in her time are adequate. They are in the Defendant's hands, and must remain there, for any thing which can be decreed in this suit. The Defendant says, she surrendered them. We must take that for granted, until her representative shall contest it. Admitting it to be so, those profits constituted a compensation for the education, that is, such an education as the children could have got in the country at that time. This exception is therefore overruled. And the Master will immediately compute the legacy according to these directions.

The account here has been taken, according to the course of the Court. The order of reference need not be specially renewed at every term. The Defendant being a resident of another State, and having no agent mentioned of record, or known to the Master or parties, it was regular to serve the notices to attend the Master, on the Solicitor or Counsel in Court.

PER CURIAM.—Decree that the Plaintiffs are entitled to one-third of the amount of the award, and charge the Defendant, the administrator of *Thomas Person*, the elder, with interest thereon from the death of the mother in 1813, and an account is directed accordingly.

Margaret Arnett et al.
v.
Zachariah Linney, ex'r of William Linney. } From Iredell.

An executor who does not render an account, and swear that he has not used the fund himself, nor loaned it to others, but has kept it on hand for the purposes of his trust, is to be charged with interest from the date of his receipt of the trust money.

An executor who has used any part of the trust fund for his own advantage, must be held to a strict interest account, unless he keeps such account, and produces and verifies it before the Master.

This was a bill filed by the residuary legatees of *Wm. Linney*, who died in the year 1821, against the Defendant, his executor, for an account of his estate and payment of their legacies. The Defendant submitted to an account; but in his answer, did not give one, but merely referred to his vouchers, which were filed.

Upon a reference, the Master reported, neither party appearing before him—that from the papers on file it appeared, that the gross amount of the estate was $14,357 12, and the debts $1,020 33. Interest was charged the Defendant upon the several sums received by him from the day they came to his hands, and credited him on his disbursements from the time they were made. The same course was adopted as to several partial payments made to the Plaintiffs, and the result of the whole was, that the Plaintiff owed, of principal, to the Plaintiff *Margaret* alone, a balance of $417 62, and of interest $169 28. The Defendant excepted to the report, because of the manner in which the interest account had been settled.

Hogg, for the Defendant.

Devereux, *contra*.

RUFFIN, Judge.—The only question in this case arises on an exception to the Master's report, charging the Defendant interest. The Defendant is an executor, who qualified in 1821. The Master charges him with

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interest on money received by him, from the day of the receipt, and in like manner gives him credit for interest on his disbursements, in paying debts, and for partial payment of the legacies, from the day of the disbursements. This is admitted to be generally right, when the executor renders no account, and has been dilatory in returning inventories, and paying the legacies. But it is said, that here the accounts taken by the Master show upon their face, that the Defendant distributed the money received by him amongst the legatees, as soon after it came to his hands, that it is apparent, he could not have made profit. If we were certain of that fact, the exception would be allowed; because the profit, made by the trustee is the foundation of the decree for interest against him. When he keeps the fund on hand ready for the legatees, and gives them early notice of it, or pays it upon application, he is not liable for interest. If he pays it over immediately, the interest being calculated on both sides produces the same result, that would follow the allowance of it on neither. If there be debts falling due, which require the money to be kept on hand to meet them, the executor is not chargeable with interest. For the situation of the estate requires him to keep a fund yielding no profit. But here the debts were very inconsiderable; and the estate large. If the executor, as between him and legatees, expects not to pay interest, it must not appear, that he has made any use, for his private advantage, of any part of the funds of his testator. If he has, he must be held to a strict interest account for the whole, unless he keeps such accounts and produces and verifies them before the Master, as will show exactly what profit he has made. The fact is within the executor's own knowledge, and that of no other person. It is true in this case, that some of the payments of the legatees were made, so soon after parts of the funds came into his hands, that there was probably a distribution of the very money received. He loses the

interest only on the time intervening between the receipt and payment, as the Master has credited him with interest from the time of payment. But he ought not to lose that interest if his conduct was fair, and he actually kept the money on hand. With respect to other large sums, however, that is not the fact, for the difference on the interest account is upwards of $700; whereof the Plaintiff Margaret's part is $169 28. No account has been rendered by the Defendant before the Master; much less one from which the profits made could be ascertained. The Master has been under the necessity of stating the accounts ab initio. In such cases, executors must expect to be charged interest, unless they positively and unequivocally swear, that they have not used the money themselves, nor loaned it to others, but have kept it on hand for the necessary use of the estate. We are obliged to adopt this rule, to prevent executors from taking undue advantages; since it is impossible to trace the money, and prove the particular uses made of it by the executor. He can always exonerate himself by keeping fair accounts, and purging himself on his oath. In the present instance, it appears from some of the exhibits, that the Defendant and his agent have applied to their private use, at times, some portions of the money; and the executor has not personally appeared before the Master at all. The exception is therefore disallowed, and the report confirmed.

June, 1820.

Arnett v. Arnett.

PER CURIAM.—Let a decree be entered according to the report.

William Lee
v.
James Norcom, } From Chowan.

Upon the removal of an Equity cause to this Court, under the act of 1818 (*Rev. c.* 962) the original papers are to be sent here—and if the Clerk below sends copies of them, the costs of the copies cannot be taxed.

This was a bill for an account of profits of lands, which the Plaintiff and Defendant jointly cultivated.—The issue between the parties involved matters of fact only.

After the hearing, *Hogg*, for the Defendants, objected to the bill of costs which was sent up from the Court below, because notwithstanding the cause was removed to this Court for hearing, the Clerk and Master below had made out a transcript of the papers, instead of sending the originals, and had charged the usual costs of copies.

Devereux, for the Plaintiff, concurred with *Hogg*, in moving that the taxation be reformed.

RUFFIN, Judge.—This cause was removed for original hearing in this Court, under the act of 1818. (*Rev. c.* 962, *s.* 5.) The construction of which is, that the whole case and the original papers are to be sent. It is not like an appeal. In this last, the decree is that of the Court below, and this Court reverses or affirms it. The pleadings and proofs must therefore remain below, as the foundation of the decree. But upon removals, the decree is altogether the act of this Court. The Clerk and Master of Chowan ought not therefore to have sent a *transcript*; and he cannot charge the parties the fee for making it. His bill of costs must be reformed by striking that item out.

PER CURIAM.—Let the costs of the copies sent to this Court be stricken from the bill of costs.

Thomas W. Poindexter v. Isaac McCannon & Henry Hauser, } From Surry.

Where, upon the face of a transaction, it is doubtful whether the parties intended to make a mortgage or a conditional sale, Courts of Equity incline to consider it a mortgage; because by means of conditional sales, oppression is frequently exercised over the needy. But there is no rule of Equity, which forbids the making of conditional sales. And where the subsequent acts of the parties are consistent with the idea of a sale, a redemption is not decreed. For although the acts of the parties are never regarded at law as a rule of construction, yet in Equity they are considered as evidence of the intent.

Where, upon the purchase of a slave, a full price was paid, and no bond or covenant taken for the repayment of the purchase money, in case of the death of the slave, and possession was given immediately, *held*, that these circumstances, added to the fact that the buyer was necessitous, and that twelve years had elapsed before redemption was claimed, proved that a clause, whereby the seller reserved to himself the power of annulling the bargain, did not render the transaction a mortgage, but a conditional sale—to claim the benefit of which, there must be a strict performance by the seller.

This bill was filed in October, 1823, to redeem a negro man slave, which the Plaintiff alleged he mortgaged to the Defendant, *McCannon*, on the 13th September, 1810, and which *McCannon* sold to the other Defendant on 14th September, 1811. The bill alleged that the Plaintiff was indebted to *McC.* in the sum of $ 150, and wanting money, he borrowed $ 153 more from him, and to secure the payment of the whole, agreed to mortgage to him the negro in question, then a likely boy about sixteen years old, and worth $ 500. That accordingly he made him a bill of sale, expressed to be in consideration of $400, and put the negro immediately into *McCannon's* possession, upon an agreement which was charged to be usurious, that his hire should extinguish the interest. It averred expressly, that the agreement was for

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Poindexter v. McCannon et al.

a mortgage to secure the debt of $ 308. The deed was exhibited by the Defendant, and was absolute upon the face of it. But there was an endorsement on it, in these words: "N. B. If the above bound *T. W. Poindexter* pay up to the above named *J. McCannon*, the sum of four hundred dollars, within twelve months from the date hereof, the above bill of sale to be void, and the negro boy returned." The Plaintiff further alleged, that in 1814, he tendered to both of the Defendants, the money due on the mortgage—which they refused to take.

McCannon, in his answer, admitted the bill of sale, and the *nota bene*. But he denied positively, that it was a mortgage, and affirmed that it was a purchase by him for full value, with an agreement to re-sell at any time within a year, at the same price. He averred that the Plaintiff wished to give a mortgage, but that he refused to treat on such footing; and after they had contracted, upon redemption at an indefinite period being mentioned by the Plaintiff, he, *McCannon*, refused to complete the purchase. And that finally, the Plaintiff agreed to make a sale, if he, *McCannon*, would consent to re-sell to him, as above mentioned. He denied that he made any loan to the Plaintiff; and averred that the Plaintiff owed him about $ 225, for land sold to him. That he then paid the Plaintiff a sum of money, and gave him an order on his father's executor for $ 86 50, being the full balance of the price of $ 400. He likewise averred, that he then surrendered all the evidences of his previous debts, as they were satisfied in the price of the slave. He admitted, that in 1814, Plaintiff pretending that the conveyance was a mortgage, said, that if he, the Defendant, did not make good the order for $ 86 50, he would sue for the negro. He denied the tender of the money, and averred that although he did not then feel bound for the order, yet as the Plaintiff was his brother-in-law, and he wished for peace, he authorized a mutual friend to pay him the principal and interest on it, if the Plaintiff would

abandon all claim; which was accordingly soon after done. He further stated, that wanting money himself, before September, 1811, to discharge an execution against him, he applied to the Plaintiff to rescind the contract, and take the negro back; and received for answer, that he might sell the negro, for that he, the Plaintiff, could not re-purchase him. That upon this, he made the sale to the other Defendant, for the same price of $ 400; but that the Plaintiff might have still further time, he annexed to the bill of sale to *Hauser*, a similar condition to that which was annexed to the one to himself. And he averred, that neither he nor *Hauser* imagined, that either deed constituted a mortgage, and admitted, that he considered his contract with *Hauser* as a sale.

The answer of *Hauser* did not vary the case, but corresponded with *McCannon's*, as to those parts of the transaction in which he had a personal agency.

Replications were filed to the answers, and testimony taken, which will be found stated in the opinion of the Court.

Winston, for the Plaintiff.

Gaston & Devereux, for the Defendants, cited *Coke L.* 205 *a.*—*Bonham* v. *Newcomb*, (1 *Vernon* 7, 214, 232) *Mellor* v. *Lees* (2 *Atk.* 494) *Verner* v. *Winstanly* (2 *Scho. & Lef.* 393) *Goodman* v. *Grierson* (2 *Ball & Bea.* 274) *Conway* v. *Alexander* (7 *Cranch* 218).

RUFFIN, Judge, after stating the case as above, proceeded: A mortgage and a conditional sale are nearly allied to each other, and it is frequently difficult to say, whether a particular transaction is the one or the other. The difference between them is, that the former is a security for a debt; and the latter is a purchase for a price paid, or to be paid, to become absolute on a particular event; or a purchase, accompanied by an agreement to re-sell upon particular terms. It is the latter kind, that

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runs so nearly into a mortgage. For, as needy and distressed men, are those who are commonly drawn into such contracts, and the very anxiety to get their estates again, which produces a stipulation to that effect, denotes either that it was favorite property, which the party did not intend to part from conclusively, or that the price was so inadequate, as to make it material, in point of interest, that they should have the power to reclaim, Courts lean towards considering them mortgages. But there is no rule of law, that a sale shall not be made conditionally. In each case, the only difficulty is, to ascertain the character of the transaction. When it is once determined to be a mortgage, all the consequences of account, redemption, and the like, follow, notwithstanding any stipulation to the contrary. For the power of redemption is not lost by any hard conditions; nor shall it be fettered to any point of time, not according to the course of the Court. This is well expressed in the familiar maxim, "once a mortgage, always a mortgage." In the present case, the clause inserted in the deed may well consist with a contract of either description. It is equivocal in itself. But it is sufficient to induce the Court to decree a redemption, if nothing else appeared, because the Court inclines to that side, to prevent oppression and hard dealing. It is however susceptible of variation by the acts of the parties, and the circumstances attending the transaction, which show it to be the one or the other. I do not mean, that it can be contradicted by the testimony of witnesses, to show either that the bargain was different from that expressed, or that it was meant to be, unless there be fraud. But I mean, that the parties' acts and their dealings are material to show the intent. *Streator* v. *Jones* (2 *Hawks* 423) for instance, is a case where an absolute deed was held a security, upon evidence of lending and borrowing between a needy man on one side, and an habitual and hard lender on the other; of great inadequacy of price, if it

was a price; and of the possession of the land by the bargainor, after he made the deed. As *Sir James Mansfield* says (*Iggulden* v. *May*, 2 *New Rep.* 449) the conduct of the parties can never be looked to, to fix a construction at law upon their deeds, as had been done in *Cooke* v. *Booth* (*Cowp.* 819) But in Equity, their conduct is often regarded as evidence of the intent of making a contract. Now what are the usual badges of a mortgage? They are, that there is a previous debt, or a present advance of money upon *loan;* for which some evidence is taken, obliging the borrower personally to the absolute payment. There is a bond for the debt; or a covenant in the mortgage deed for the payment. This is usual, where the security by mortgage is taken on landed property. Much more should we expect to find it, where the security is on a slave, who may die the next day. It is always a question, in mortgage or no mortgage—whose loss will it be, if the thing is destroyed. If that of the maker of the deed, then it is a mortgage. Again, one of the most difficult situations, that can be, is that of a mortgagee in possession. He is subjected to an account, generally the most rigorous and under great disadvantages; for he is liable not only for profits made, but that might be made; and profits are always greater to standers by, who have a high opinion of their own management, than they are in reality to those who work. Hence a mortgagee never takes possession, until he is obliged. Nor is a mortgagor more willing to go out of possession, and give up the management and present use of his property. The one does not surrender, nor the other take possession, but as the last alternative. And we may almost venture to assert, that no mortgagee or mortgagor ever yet made a contract, upon which the possession was to change immediately, unless it were the veriest grinding bargain, that could be driven with a distressed man, who had no way to turn. When to this is superadded, that a fair and full price,

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$400 was paid, it seems impossible to believe, that it could be on loan. That this price was paid, is fully proved by the Plaintiff's own brother, who was present at the treaty, and wrote the deed. I do not refer to his deposition, for the sake of what he says was the understanding of the parties; though in that respect he supports the answer; but to get at the acts of the parties. He proves, that they came to a settlement, not to ascertain the debt due to the Defendant, that it might be secured; but to ascertain its amount, that it might be known how much would remain to be paid in money. Upon that settlement, all the old bonds were given up, and no new one taken. Part of the debt was for the price of land. Would the Defendant have relinquished his equitable lien on that, for the precarious security of a mortgage on a slave, for that and other advances to the full value? The Defendant likewise took immediate possession.

Here then it appears, that instead of a *security* for a debt, the slave was partly a *satisfaction* of a pre-existing one; and the balance was then paid. If the Plaintiff had been borrowing, and pledging his negro as a security, would he have received so large a part of the loan in an *order*? Such a payment might be expected to be received. But such a loan is out of the way of business. The subscribing witness is supported by several others, in his statement of the value of the negro and of the Defendant's possession. The sum advanced was the *full* value. These circumstances satisfy me, that a redemption was never intended. And the sale by *McCannon* to *Hauser* at the same price removes every appearance of it. He might have taken the negro in payment and advanced the difference; because he could then sell himself again after a reasonable time. But the idea is preposterous, that a man, who was himself obliged to raise money, would surrender a good security on land, for the

purpose of getting a mortgage on a negro, which, as mortgaged property, he could not sell. Without citing particular cases, I will only refer to the general principles collected from them by *Mr. Butler*, in his note to *Co. Litt.* 205 *a*. The circumstances here repel every idea of a mortgage, or of a security redeemable at an indefinite period. The old securities were given up, and no new one taken; the price paid was a full one; the purchaser himself was necessitous, and obliged to part from property to pay his own debts; he took immediate possession; and actually made sale of the negro the day after that limited for the Plaintiff's re-purchase; and upon such sale only got his own money back; and this was twelve years before this suit was brought. If this cannot be considered a purchase, then there can be none, unless it be absolute at the making of it and forever.—The Plaintiff has no case; and his bill must be dismissed with costs.

PER CURIAM.—Let the bill be dismissed with costs.

Richard Newsom & Mary his wife, et al. v. William Bufferlow, } From Northampton.

Equity relieves against mistakes, as well as against fraud in a deed or contract in writing; and parol evidence is admissible to prove the mistake, though it is denied in the answer; and this, when the Plaintiff seeks relief, affirmatively on the ground of mistake.

As where the owner of two adjoining tracts of land, having sold one of them, in describing the metes and bounds in a deed executed to the purchaser, by mistake included both tracts. The proof of the mistake being perfectly satisfactory, the vendee was decreed to reconvey to the vendor the tract of land not intended to be conveyed.

The Plaintiffs in their bill alleged, that *Jesse Webb*, the first husband of the Plaintiff, *Mary*, and the father

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of others of the Plaintiffs, being the owner of one tract of land, purchased an adjoining tract of one *William Amis*, and to secure the purchase money, conveyed both tracts to one *John D. Amis*, in trust, in the usual form; that afterwards, with the consent of the trustee, he sold the land purchased of *Amis*, to the Defendant—but that when he executed a deed for the land so sold, through mistake or fraud, the courses of the deed of trust executed by *Webb* to *John D. Amis*, were copied, instead of those of the deed from *William Amis* to *Webb*, and thus that all the land which he, *Webb*, owned, was conveyed by that deed. The death of *Webb*—the intermarriage of the Plaintiff, *Newsom*, and *Mary*, and the descent from *Webb* to the other Plaintiffs, were then alleged—and also the fact that the Plaintiff, claiming both tracts, had brought an ejectment (1 *Law Cases* 208) against the Plaintiff, *Newsom*, who was in possession under an assignment of dower to his wife, and was pressing the same to a trial.

The bill prayed, that the Defendant might be enjoined from proceeding at law—and also that the mistake in the deed might be corrected.

The Defendant, in his answer, positively affirmed, that the deed executed to him by *Jesse Webb*, in his lifetime, was in exact accordance with the understanding and design of the parties thereto, and that it conveyed all that was intended to be conveyed thereby, and no more.

Upon the coming in of the answer, the injunction was dissolved with costs. But upon the motion of the Plaintiffs, the bill was held over as an original, and a replication to the answer was filed. Many depositions were taken; but it is not necessary to state them in detail, as the Court, on the hearing, were clearly satisfied that the Plaintiffs had established every part of their case.

Seawell, for the Plaintiffs, cited *Henkle* v. *Royal Ex. Ass. Co.* (1 *Ves. sen.* 319) *Townshend* v. *Strangroom* (6 *Ves.* 328) *Baker* v. *Payne* (1 *Ves. sen.* 459) *Simpson* v. *Vaughan* (2 *Atk.* 32) *Burn* v. *Burn* (3 *Ves.* 573) *Gillespie* v. *Moon* (2 *Johns. C. R.* 585) *Pitcairne* v. *Ogbourne* (2 *Ves.* 377).

Badger, for the Defendant, referred to *Rich* v. *Jackson* (4 *Brown C. C.* 514) *Woollam* v. *Hearn* (7 *Ves.* 211).

HALL, Judge.—It is altogether unnecessary to enquire, in this case, how far Courts of Equity have gone, in carrying into effect written executory contracts, or varying them by parol evidence. Suffice it to say, that the reason why they have declined giving relief in many such cases is, that the Plaintiff *had a remedy at law*. That reason is not applicable to executed contracts. In these cases, the Plaintiff has no remedy at law; and unless a Court of Equity will give relief, he can have no redress. For this reason, it is well settled, that a Court of Equity will reform a written executed contract like the present. And generally, where a clause is either inserted in a deed, or is omitted, through fraud or mistake, Equity will give relief. The authorities in support of this position, are collected in *Newland on Contracts*, *p.* 346, and *Sugden's Law of Vendors*, *p.* 97.—The case of *Gillespie & wife* v. *Moon* (2 *Johns. Ch.* 585) is in point. There a deed was executed by mistake for two hundred and fifty acres of land, when it ought to have been for two hundred only. Parol evidence was let in to prove the mistake, although it was denied by the answer. Upon the same subject, see *Souverbye* v. *Arden* (1 *Johns. Ch.* 240, 252) *Getman* v. *Beardsly* (2 *John. Ch.* 275) and *Lyman* v. *United Ins. Co.* (*Do.* 630).

His Honor then recapitulated the facts of the case, and proceeded:—

Without recapitulating the testimony offered by the Plaintiffs in this case, it may be assumed as a fact,

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beyond rational doubt, that the courses of both tracts of land, instead of the one purchased of *William Amis*, were, through fraud, or to say the least of it, through mistake, inserted in the deed to *Bufferlow*. It is to be regretted, that the courses of the other tract of land have not been set forth in the bill, or otherwise made to appear to the Court. A reconveyance of that land, to be made by the Defendant, cannot be, for that reason, decreed at this time. To ascertain them, let a commission issue to the County Surveyor, to make a survey of that land, and ascertain the boundaries, with directions for him to return a plot and survey of it to the next term of this Court; unless in the mean time, the parties agree upon the boundaries of the tract of land, which was intended to have been conveyed, viz. the land which *Webb* purchased of *William Amis*; and let the costs of this suit be paid by the Defendant.

PER CURIAM.—Decree accordingly.

David L. Ryan,
v.
Clement H. Blount, Ebenezer Pettigrew et al. ex'rs. of John Beasley,
} From Bertie.

An award may be corrected for error in law, where it appears on its face that the arbitrators intended to decide according to law, but have made a mistake.

Interest is not of course to be compounded in favor of a ward against the executors of his guardian, but simple interest only is to be computed from the death of the latter, unless compound interest was received.

Ordinarily, a guardian is to be charged with compound interest, but he may be exempted from it by proving that, after suitable exertions, he was unable to realize it.

No decree can be made against one on whom process has not been served, unless he has entered an appearance.

The Plaintiff in his bill alleged, that *David Ryan*, his father, had died in the year 1802, having made a will

whereby he bequeathed the whole of his personal estate to the Plaintiff and another son, and appointed his wife *Mary B. Ryan*, executrix—that the executrix never in any way managed the said estate, but confided the whole thereof to her brother *John Beasley*, the testator of the Defendants, who had also procured himself to be appointed guardian of the Plaintiff—that *Beasley* had never accounted for the assets of *David Ryan*, which had come to his hands, neither had he in any way settled his accounts, as guardian of the Plaintiff, nor made any returns, so as to enable the Plaintiff to charge him with the receipt of any precise sum. The prayer of the bill was for an account of *David Ryan's* personal estate, and also of the Plaintiff's estate, received by the Defendant's testator, as guardian.

Process issued upon this bill, and was served on all the Defendants but *Pettigrew*, who never entered his appearance.

No answers were filed by any of the Defendants; but by an agreement, signed by the Plaintiff and all the Defendants, except *Pettigrew*, the matters in difference between the parties, were referred to arbitration.

On the Fall circuit of 1829, the arbitrators returned their award, accompanied by an account of the funds with which the Defendant's testator was chargeable; from which it appeared, that they had ascertained that the sum in the hands of the latter, due the Plaintiff, on the 1st of January, 1815, to be $2,236 05, upon which they had allowed the Plaintiff compound interest, up to the 1st of January, 1829, amounting in the whole to $5,055 36.

Upon the coming in of this award, before his Honor Judge DANIEL, it was objected to the award by the Defendant's Counsel, that the award should be set aside, as to that part thereof wherein the Defendants were charged in the report made by the said arbitrators, and filed in

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the cause, with compound interest from the 1st day of January, 1815, to the 1st day of January, 1829, and the said report being examined by the Court, and it appearing to the Court, that the Defendants were charged with compound interest, from the said 1st day of January, 1815, to the said 1st day of January, 1829, (*John Beasley*, the guardian of Complainant, having died about the 1st day of January, 1815) and it appearing to the Court, that the arbitrators did so charge the Defendants with compound interest; and it appearing further to the Court, that the arbitrators undertook to decide according to principles of law, and they mistook the law in so charging the Defendants with compound interest: It is ordered and decreed, that the award be set aside as to that part thereof, the Court being of opinion, that the Defendants are chargeable with simple interest only, from the death of the guardian. And now a computation being made by consent at this term, charging the Defendants with simple interest only, from the 1st day of January, 1815, whereby it appears that the sum of $3,761 58, was due Complainant on the 1st day of January, 1829, according to the award, and according to that method of computation, of which sum $2,044 34 is principal; and it is ordered and decreed, that the award in all other matters and things be confirmed.

Whereupon, it is ordered and decreed by the Court, that the Complainant, *David L. Ryan* do recover of the Defendants, *James Iredell, Clement H. Blount* and *Ebenezer Pettigrew*, executors of *John Beasley*, the said sum of $3,761 50, with interest, &c.

From this decree, so far as it directed the award to be set aside, as to the compound interest charged the Defendants, the Plaintiff appealed.

Gaston, for the Plaintiff.

Hogg, for *Pettigrew*.

Badger, for the other Defendants.

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HENDERSON, Chief Justice, after stating the case, as above proceeded:—If in fact it did appear upon the award, where alone the Court can look to find it, that the arbitrators decided according to law, and mistook the law, the error may be corrected; for thereby the award is not varied from what the arbitrators intended, but it is made to be what they designed it should be. But no such intent appears upon the award, or otherwise as we can perceive. The Court must have come to that conclusion by conjecture, or by evidence *aliunde*; neither of which sources will do. It must plainly appear upon the award; otherwise it is taken that the arbitrators intended to be governed by their own rules or notions of right. Both the law and the facts are referred to them. And where there is no fraud or mistake, the latter to be ascertained as before stated, the award is conclusive.—It is in their judgment as to both, that the parties confide. It is quite possible, nay, it is probable, that the arbitrators intended to be governed by the law on the subject of interest. And if they did, the compounding of the interest against the Defendants as a *matter of course* was an error. For altho' they represented him who had been guardian, and who as such *prima facie* was chargeable with compound interest, the compounding of the interest as a matter of course should cease with his guardianship. When I say compounding interest ceases as a matter of course, I mean to say, that his executors are not to be charged with compound interest unless it is shown, that they had made it. Neither do I mean to say, that a guardian is in all cases to be charged with it. *Ordinarily he is.* But he may be *exempted from it by showing that he has been unable to make it, after using his best exertions to do so.* Why these arbitrators charged the Defendants with compound interest we know not. It might have been by mistake. It might be because the ward's property produced it in their hands. We cannot therefore even say, that this award has not met the ac-

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tual justice of the case, according to our own notions.—Much less can we say, it did not according to the notions of the arbitrators, who are judges of the parties' own choosing. The decree must therefore be reversed, and decree according to the award, except so far as it is awarded against *Mr. Pettigrew*. Against him there can be no decree, nor can he be otherwise affected by the decree, than the decree against his co-executors affects the assets of the estate. Of course it affects the assets in his hands. Nor does the award affect the other executors personally. The decree must therefore be against the assets in their hands. The question of assets is left entirely open.

PER CURIAM.—Decree of the Court below reversed, and decree for Plaintiff for the sum of $5055 36, with interest, &c. to be levied of the assets in the hands of the Defendants.

John Reeves et ux. et al.
v.
Thomas Reeves et al.
} From Orange.

Every testator is presumed not to intend to die intestate, as to any part of his estate. Therefore, a residuary clause, unless expressly restrained, always passes whatever is not otherwise disposed of.

Parol evidence is inadmissible to prove, that the intention of the testator was not properly expressed in the will, or that he used words, the meaning of which he did not understand.

The Plaintiffs in this bill averred, that *Thomas Lynch* duly made and published his last will—whereby, after devising three hundred acres of land to his brother *Jesse Lynch*, he proceeded as follows: "I give all the balance "of my land, with the appurtenances thereof to my bro- "ther *Moses*. I also give him my negro man *Jim*, with "all my stock of all kinds, with the balance of all my "property, to my brother *Moses*. That the second clause

"of this my last will and testament may be properly "understood, I wish my brother *Moses* to inherit all my "property, except the three hundred acres of land men- "tioned in the first clause, given to my brother *Jesse*." That he appointed his brother *Moses* executor, who dying shortly after the testator, the will was proved by the Defendant, *Reeves*, who took out letters of administration, with the will annexed. That at the time of making the will, the testator had in his possession only one slave, the negro *Jim*, but was entitled to sundry others, which were held adversely to him. That the will was written by the Defendant, *Reeves*, who, at the time of writing it, asked the testator what he intended to do with the other negroes which he claimed, but which were not in his possession, and received directions to say nothing about them in the will; the testator adding that they were not in his possession, and he never intended to trouble himself about them—that if he had them in possession, he should not leave them to his brother *Moses*, and that if they were recovered, they would be divided among his other brothers and sisters. That after the death of the testator, suit was commenced for the said slaves by Defendant *Reeves*, which eventuated in his favour.

The Plaintiffs were the brothers and sisters, and the husbands of the latter, of the testator, who died without issue, and unmarried. The other Defendants, besides *Reeves*, were the children of *Moses*, the residuary legatee. The Plaintiffs contended, that the negroes recovered by the Defendant *Reeves*, did not pass as a part, of the residue of the testator's estate—because the words of the residuary clause were general—or, if they did pass by it, that it was drafted so as to include them by mistake.

The Plaintiffs sought an account of the negroes recovered by the administrator, and of their hire, and for a distribution of the amount.

The Defendant, *Reeves*, in his answer, admitted the whole of the case made by the Plaintiffs.

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The other Defendants denied the conversation alleged to have taken place between the testator and the Defendant, *Reeves*, and averred, that on the trial of the suit brought by him for the negroes now claimed, the Plaintiff, *John Reeves*, who was the father of the Defendant, *Thomas Reeves*, was offered as a witness, and on his *voir dire*, swore he was not interested in the event of that suit, as the negroes, if recovered, passed by the residuary clause of the testator's will, to his brother *Moses*. They also averred, which was admitted to be the fact, that an issue of *devisavit vel non*, as to the will of the testator, between the Plaintiffs and the Defendant, *Reeves*, had been found in the affirmative.

Replications were taken to the answers. The testimony was principally confined to some declarations of the testator, as to his intentions in disposing of his property, made before the execution of the will.

Nash, for the Plaintiffs.

Badger, for the children of *Moses Lynch*.

RUFFIN, Judge.—The construction of the will cannot admit of a doubt. It may seem singular enough, that the testator should, in a clause intended to pass many negroes, expressly mention but one of them. It is argued from thence, that he had not *animum disponendi* as to those not mentioned. But it is to be remembered, that every testator is presumed not to intend to die intestate, as to any part of his estate; and therefore that a residuary clause is always, unless expressly restrained, held to pass whatever is not otherwise disposed of. If there was nothing particular therefore in this will, there could be no question. But there seems to have been more than ordinary anxiety in the testator's mind, that this meaning should be given to his will; for after giving all the balance of his property to *Moses*, he declares that he desires

this to be properly understood, and that it may be, he repeats that his meaning is, that *Moses* shall *inherit all* his property, except the land given to *Jesse*. Surely this must take all.

Then as to the parol evidence and answer of the administrator, to vary this construction: it is impossible that the idea should be admitted for a moment. It would be to upset all wills by the loosest of proof. If there was any thing in it, there was an opportunity, on the probate of the will, to make the most of it before the jury; who, if satisfied of any fraud, might have found part to be the testator's will, and part not. But it would be extremely dangerous, entirely too much so, to say, that the testator did not devise, because, in law, the paper would pass a larger estate, and more property, than witnesses supposed the maker of it meant. The meaning of the testator is to be judged of by his written words; and they must stand, unless it be shown, that he was imposed on, and did not know they were in his will; or knowing that they were there, that he had been induced by undue influence to execute it against his own wishes: which goes on quite a different ground, namely, weakness. I lay out of the case the depositions, because they go only to preceding intentions, and are contradictory. The case then stands on the answer of the administrator.

That represents, that the testator did not intend to bequeath certain of his slaves; but nevertheless made his will with a general clause, which does pass them. The subject was pressed on his notice several times; and he ordered, that nothing should be said upon it in the will; and declared, that when they were recovered, he intended them to be divided amongst his other brothers and sisters. Yet he executed his will; and that in his senses, and without imposition, as must be taken now from the solemn probate. The two positions cannot stand together; and of the two, that founded on evidence the more fallacious

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must yield. This is not at all like the cases of *Oldham* v. *Litchford* (2 *Vern.* 506) and *Barrow* v. *Greenough* (3 *Vesey* 152). In each of them, the testator intended to enlarge certain legacies, and with that view to alter his will. This he communicated to the devisees and residuary legatees to be affected thereby; and each promised the testator, if he would not make the alteration, that his wish should be observed; and in confidence thereof, the testator suffered things to remain as they were. Now this was a plain engagement, in the nature of a contract; and it would have been a gross fraud, if not performed, to have drawn the testator into such a trap. In the latter case, much of the proof appeared in writing; being contained in a letter from the legatee to the testator. I am not certain, that the first case would, at this day, be supported; because the evidence was wholly in parol. Not because of the statute of frauds merely; because there can be no doubt, that a fraud or a mistake is without that statute; but because such a fraud, or a mistake of that nature, ought to be made out by the strongest possible proof; and I do not know that, weighing the evidence judicially, any parol proof would avail to overset a written will, left uncancelled, or unrevoked by the testator. But here it is quite another matter. This is no attempt to raise a trust in the legatee, upon the ground of any fraud or promise *by him*. On the contrary, it is plainly and merely to alter a will by parol proof, that the testator used broader words than expressed his intention. It does not even go to the extent of showing, that the testator did not know what words he used; but only that he did not know the sense of them. The will cannot be contradicted, nor the construction thus varied upon parol proof. I call the evidence parol; although it is contained in the answer of the draughtsman of the will, and the now administrator of the testator. He has no interest in the matter, as he derives no benefit under the will. He is a mere executor in trust, and therefore his

answer is no more than the deposition of another witness. And this very case exemplifies strongly the wisdom of the general rule, as to the strength and extent of the proofs, which Courts ought to require in such cases.—Here comes forward a Defendant, and admits the Plaintiff's case. It turns out, that when this Defendant, as administrator, was suing a third party for the very negroes now in dispute, his title to them was made out by the evidence of the present Plaintiff, who then swore he had no interest, as the residuary clause of the will passed the negroes to another person. No sooner are the negroes recovered upon that testimony, than he asserts the will to be invalid, because the testator was *non compos mentis*. Failing in that, his next step is to assert a direct ownership, by way of trust, on the ground, that the testator did not know the meaning of his own will; and relies upon the answer of the administrator, who is his son, to show it. No one can fail to believe for a moment, that this whole career had been marked out between this father and son, from the beginning. The will is permitted to stand undisputed, while the father's competency depends on it. The effort then is to get clear of it altogether, because it serves their turn no longer. Next and lastly, it is to make out a mistake in it, by the admission of the Defendant. Who could hesitate to anticipate the admission? It happens here, that the combination is easily detected. I am apt to conclude, that it almost as certainly exists in every other case of this sort, though it may be concealed by a veil not quite as transparent. At all events, it may easily exist and elude discovery, and therefore ought to be suspected. Men in their senses are in little danger of giving away more property in their wills, than they intended; and upon a change of mind, are ready enough to express it in the will itself. But if it were otherwise, it is better that a particular mischief should be suffered, than a general inconvenience introduced. The proof ought to be

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as clear as day. It ought to shed a blaze of light, unobscured by a single cloud of doubt, upon the very point of controversy.

The bill must be dismissed with costs, as to all the Defendants, but the administrator, *Thomas Reeves*. He, being a party in interest and feeling with the Plaintiff, must be content to pay his own costs.

PER CURIAM.—Decree accordingly.

James Iredell et al. ex'rs. of Samuel Tredwell
v.
John Langston.
} From Chowan.

S. C. by his will, gave legacies to the children of J. C. The children died intestate, leaving their father the next of kin. The executor of S. C. having obtained a decree against J. C. for a mortgage debt, died, and appointed the Plaintiffs his executors. J. C. died also insolvent, leaving the debt unpaid; and the Defendant having administered on the estates of the children of J. C. upon a petition in the County Court, obtained a decree for their legacies against the Plaintiffs, who, thereupon brought their bill to set off the decree in favor of their testator against that for the legacies—alleging that there were no debts due from the estates of the children of J. C, and that his estate was beneficially entitled to the whole of the legacies. *Held*, that the Plaintiffs were entitled to the relief sought, which was nothing more than subjecting the funds of an insolvent *cestui que trust*, in the hands of his trustee, to the payment of his debts.

Where the Plaintiff and Defendant have mutual judgments in different Courts, and the Defendant is insolvent, a set-off will be allowed in Equity.

The case of *Holding* v. *Holding* (1 *Murph.* 1) approved by HENDERSON, Chief-Justice.

The Plaintiffs alleged that their testator was the executor of *Stephen Cabarrus*—that *John Charrier* was a legatee of the said *Cabarrus*, and made large purchases at a sale of his effects, to secure which, he executed two

bonds to their testator for $2,000 each—that *Cabarrus*, by his will, also gave legacies to *John B.* and *Justina Charrier*, children of *John Charrier*—that their testator, in his lifetime, procured a decree of foreclosure upon a mortgage given by *John Charrier*, to secure the payment of the two bonds of $2,000, and a sale of the mortgaged premises was made, under an order of the Court of Equity—that, after deducting costs and discount, there remained due of the original debt, after applying to it the net proceeds of the sale, the sum of $634 11—that *John B.* and *Justina Charrier* died intestate, without issue and unmarried, and not indebted, leaving their father, *John Charrier*, surviving them, who afterwards died, intestate and insolvent—that the Defendant had taken out letters of administration upon all their estates, and had recovered a judgment against the Plaintiffs, upon a petition in the County Court, for the sum of $946 37, the amount of the legacies given to his intestates, *John B.* and *Justina Charrier*, by *Cabarrus*, of which the Plaintiffs paid all but a sum equal to that due them by the intestate *John Charrier*. And the Plaintiffs prayed, that the debt due them by *John Charrier* might be set off against the residue of the judgment, recovered against them by the Defendant.

The Defendant admitted all the allegations of the Plaintiff's bill; but denied their equity, averring, that the intestates, *John B.* and *Justina Charrier* owed him, the Defendant, as did *John Charrier*, the father—to whom the Defendant had also made advances, after the death of his children.

The case was heard upon bill and answer.

Hogg, for the Plaintiffs.

Kinney, for the Defendant, cited *Bishop* v. *Church* (3 *Atk.* 691) *Holding* v. *Holding* (1 *Murph.* 1).

HENDERSON, Chief Justice, after stating the case, proceeded as follows:

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It appears to us that the Plaintiffs have a very plain equity. It is nothing more than subjecting the funds of an insolvent *cestui que trust*, in the hands of his trustee, to the payment of his debts. Nor does the case of *Bishop* v. *Church*, relied on in the argument for the Defendant, touch the question. There the assignees of the bankrupt did not hold the estate in trust for the bankrupt, but for his creditors, of whom the Plaintiff was one. It was not pretended, that whatever money he was entitled to receive, as his dividend of the bankrupt's estate, was in jeopardy. It was a mere attempt to induce a Court of Equity to set off debts at law, where the law afforded complete relief. The very basis of equity was wanting; viz: the insolvency of his debtor. As the debt, which was due the bankrupt, was not going into the hands of the bankrupt, as here it is to *John Charrier's* administrator, but into the hands of the assignees, who held in trust, not for him, but for his creditors. Whatever clear sum therefore belonged to *John Charrier*, in the hands of the Defendants, this Court will apply to the payment of the Plaintiff's decree. An account must therefore be taken of the estates of the infants, and what debts are chargeable upon them, regardless of their dignity; for *Charrier* could only claim the surplus, after *all* the debts are paid. As to the debts due from *Charrier* himself to the administrator, since he became administrator, I am inclined to think that he will be entitled to retain. For I look upon them, as advances made upon the credit of the funds in his hands, rather than as debts. I feel more difficulty as to the debts which *John Charrier* owed to the administrator, contracted prior to that time. I doubt whether a creditor can call the fund out of the hands of the trustee, without paying all the debts of the *cestui que trust* to the trustee. Whether this case presents a more favorable aspect for the Plaintiff, I cannot now say. Let an account be taken of the sums due upon the two decrees; also of the estates of the intestates, and of their

debts; of the debts due from *John Charrier* to the administrator, and of the advances by the administrator to him, distinguishing between those contracted or advanced, before and after administration upon the estates of his children was committed to the Defendant. If the parties wish, although I think it of no importance, the nature and dignity of the debts will be stated by the Master.

It was contended in argument, that if the subject matter of this bill forms any ground of relief, it also afforded matter of defence to the administrator's suit, by way of petition. For that petitions are on the Equity side of the Court *quoad hoc*. And the case of *Holding* v. *Holding* was relied on. That case is law. There the matter set forth in the bill was properly a defence, *suo vigore*. It was in *opposition* to the *cause* of action, and should have been made, wherever the action was brought. It was like *payment*, in an action on a bond, or any other *discharge* of the obligation. The ground, on which this application is made, admits the demand. It does not resist the right of recovery. It only goes to extinguish the debt when recovered, by means of a separate and distinct demand. It is even stronger than the case of a set-off, for the demands are in different rights. But if it was no stronger, a person is not obliged to set off a debt. He may do so; or he may sue upon it. The case of setting off one recovery against another is common in Courts of Law. Here the Plaintiffs were obliged to come into this Court, to show the *real creditor* in the petition. And besides, it is the case of judgments in different Courts.

PER CURIAM.—Decree accordingly.

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John Dawson, Jesse A. Dawson, and Martha Dawson
v.
Sally Dawson, Evelina Alston, and George Alston,
} From Halifax.

Volunteers, who claim under a deed of gift, executed under the impulse of feeling, rather than the convictions of the understanding, in which apparently the grantor did not exercise perfect free will, are not aided by a Court of Equity.

After the demurrer to this bill had been overruled (*ante p.* 93) the Defendants filed their answers, in which they admitted that the commissioners were requested by them, in making a division, to allot to the Defendant, *Sally*, the negroes which had belonged to her before her marriage—and that out of twenty eight slaves, which were assigned her in the division, eight only had been the property of her deceased husband.

The Defendant, *Sally*, in her answer, stated, that soon after the death of her husband, the Plaintiff, *Jesse*, who had been upon terms of intimacy with her husband and herself, ceased to frequent her house, and she learned that he felt great dissatisfaction at the disposition which her husband had made of his property—and particularly at the liberal provision he had made for her—that being much afflicted at the death of her husband, her distress was aggravated at this alienation of the Plaintiff, *Jesse*, his brother—and that she became very desirous to conciliate him—that she accordingly requested him to visit her, and told him, that to preserve the peace of the family, she was willing to relinquish all her right to the property which had belonged to her husband—that actuated by these feelings, she did, within a month after her husband's death, execute the deed mentioned in the bill.

Replications were filed to the answers, and amongst other proofs, that of the person who drafted and attested the deed that was taken. He stated, that the Defendant,

Sally, from the death of her husband up to the time when the deed was executed, was in great distress, which was much heightened by the dissatisfaction, expressed by the Plaintiff *Jesse*, with the provision which his brother had made for her—to remove which, and to restore the good understanding which had subsisted between them, she was prevailed upon to execute the deed—that when the witness was about to draw it, the Plaintiff observed to him, that his sister, the Defendant, *Sally*, wished to give up a part of the land and negroes, which she had received under the will of her husband—that the Defendant replied, "No, *Mr. Dawson*, I do not wish to do it, I do it for the sake of peace"—upon which, the Plaintiff's countenance bespoke anger. The Defendant replied, "fix it as you please, I shall be satisfied." That the Plaintiff, *Jesse*, then prevailed upon the witness to draw the deed—and that, if he, the witness, had not interfered, the deed would have conveyed a present interest in the slaves to the Plaintiff, instead of reserving a life estate to the Defendant, *Sally*.

Gaston, for the Plaintiffs.

Seawell & Badger, for the Defendants.

HALL, Judge.—Without examining into the question which the demurrer presents, viz: whether the Plaintiffs are volunteers, and how far this Court will aid them by setting aside the division of the slaves, according to the prayer of the bill, the case may, and I think ought, to be decided upon the circumstances which preceded the execution of the deed, and those which were cotemporaneous with it.

His Honor then recapitulated the testimony of the attesting witness, as above stated, and proceeded;

It is to carry into effect a deed of gift thus obtained, that the present bill is filed. It does not appear to me, that the free assent of the grantor was given to the exe-

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cution of the deed. It was more the offspring of her feelings, than of her understanding. The Plaintiff is at liberty to use it at law, if it will be of any avail to him there. But a Court of Equity cannot grant him any relief, without transcending those limits which for ages it has professed to be governed by.

PER CURIAM.—Let the bill be dismissed with costs.

Lewis Ellis
v.
William Ellis, } From Edgecombe.

A bill in the alternative, either for a specific performance of a parol contract, or a repayment of the purchase money, is not sustained by Courts of Equity, because if the contract be avoided, the money may be recovered at law.

But upon a bill for a specific performance, which has been refused, where, from peculiar circumstances, the Plaintiff cannot at law recover back his purchase money, its repayment is decreed by the Court.

Where a contract is declared to be void, the parties are remitted to their original rights; and where a Court of Equity aids in restoring them to those rights, it confines itself to restitution merely, and never decrees damages for a loss.

Upon a parol contract for the sale of land, the bond of a third person was assigned, in payment of the purchase money, to the vendor, at the instance of the vendee, by one who was not a party to the contract, the obligor in which was insolvent at the time of the assignment, upon a decree declaring the contract to be void, as the vendee could, at law, recover neither the bond nor the money, the Court lent its aid; but proceeding upon the principle of restitution merely, they ordered a judgment upon the bond in favor of the vendor, to be assigned to the vendee.

After the decree made in this case, at June term, 1829, (*ante p.* 343) reversing the decree made for the Plaintiff, at June term, 1828 (*ante p.* 180) the Plaintiff moved for further directions to the Master, as to the

purchase money paid by him to the Defendant—contending, that although the Court would not decree a specific performance of the contract, yet it would prevent the injury which would result to the Plaintiff from the fact, that he could not recover the purchase money at law, in an action for money had and received by the Defendant to his use, because that action was barred by the statute of limitations. The facts upon which this motion was founded, will appear by a reference to the case, as already reported, and in the opinion of the Court at this term.

The motion was discussed at length, by *Hogg*, for the Plaintiff, and by *Gaston & Badger*, for the Defendant.

For the Plaintiff were cited, *Fingal* v. *Ross* (2 *Eq. Ca. Ab.* 46. *pl.* 12) *Clinan* v. *Cooke* (2 *Sch. & Lef.* 43) *Phelps* v. *Thompson* (1 *Johns. Ch. Rep.* 150) *Denton* v. *Stewart* (1 *Fonb.* 43, *note* 2) *McReth* v. *Marlar* (1 *Cox* 268) *Gwillum* v. *Stone* (14 *Ves.* 128) *Todd* v. *Gee* (17 *do.* 273) *Rebee* v. *Bank of N. York* (1 *Johns. Rep.* 530, 548).

RUFFIN, Judge.—This cause now comes on, upon a motion of the Plaintiff for further directions; and he claims the assistance of the Court, upon the ground, that as the contract for the purchase of the land, being by parol, cannot be executed, the payments made by him ought to be decreed back. The question of jurisdiction has been much debated at the bar. In general it may be assumed, with certainty, as the rule, that Equity does not entertain a bill in the alternative, upon a parol contract for the sale of land; that is to say, to have a conveyance of the land, or the payment of the money back. Because as far as concerns the land, the contract is merely void; and the money can be recovered at law, as money had and received. There have been some cases, in which a decree for the repayment of the money has been made in this Court, upon a bill for specific performance. But they turned on their own circumstances; as in *Phelps*

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v. *Thomson*, (1 *John. C. Rep.* 132) where it was clear, that relief at law would be inadequate; and in *Chaun* v. *Cook* (1 *Sch. & Lef.* 43) where there was a particular agreement to return the fifty guineas, if the main contract could not be performed. But it is unnecessary to consider the cases further; because this point in the present case rests on very special grounds also. The Plaintiff might not be able to get at law that very thing, to which alone he has the right. He contends, indeed, that he ought to recover in money the nominal sum, which he gave for the land. But as he gave that in a bond on *Stanton & Peel*, he may not be entitled to the money, unless the Defendant has collected it, or failed to collect it by his own fault. If no *laches* could be imputed to the Defendant, the Plaintiff would be limited to the bond only. It may be said, that it could be recovered in *trover*. So it could, if it had been merely delivered over to the Defendant by the Plaintiff. But in the present case, it came to the Defendant by the endorsement of *Horn*, the Plaintiff's guardian, to whom it was payable. The legal title of the bond is therefore in the Defendant, and at law the Plaintiff could not recover it. Indeed it appears, by one of the exhibits, that the debt was put into suit, in the name of the Defendant, against *Stanton & Peel*, and has ripened into judgment. The jurisdiction in this particular case may be sustained on this clear ground, without reference to the doubt at law at the time the bill was filed, and the supervening bar of the statute of limitations, upon which I wish to give no opinion.

The next and important enquiry is, what is the extent of the relief which the Plaintiff can have? The case is, that the Plaintiff being entitled to the sum of about $700 from *Horn*, the guardian of his wife and her brother, agreed to give it to the Defendant for a tract of land.—*Horn* had invested that sum and about $400 more, in the bond of *Stanton & Peel*, for $1100 payable to himself as

guardian. After some treaty about dividing the bond, it was finally agreed, that *Horn* should endorse the whole bond to the Defendant, as the price of the land, and guaranty all above the Plaintiff's own share. This was done; and the Plaintiff gave his bond, with the Defendant as his surety, to *Horn*, for $424 79 the difference between his portion and the amount of *Stanton & Peel's* bond. The Plaintiff entered upon the land, and the Defendant brought suit against *Stanton & Peel*, and recovered judgment; but has received no money from them, as it turned out that they were insolvent at the time of the contract between these parties. It has been much disputed at the bar, whether this bond was received by the Defendant, in absolute payment for the land, or as a payment if it should be collected. We do not consider it worth our while to determine that, because the decree is upon another reason. We would not however help by forced construction to take a man's land away, without his receiving any thing for it, when he gave such strong evidence of his determination to have good security, as retaining the title. The evidence on this point is, at best, not clear for the Plaintiff. But admitting that the contract was, as the Plaintiff says, where is the ingredient of equity against the Defendant, to make the bond good. Or what is the Plaintiff's equity to any thing more than restoration to that which he parted from? The Court has declared the contract, as such, void. The parties are therefore remitted to their original rights. It is said, that the Plaintiff is entitled to get back what he lost. This was his wife's portion. On the other hand, I think the Defendant is to pay back only what he gained. It is his gain, and not the Plaintiff's loss, which must regulate our decree. If not, this is not a case of restitution, contract or trust, but of damages. But if the Plaintiff's loss is to be the measure, what part of it is owing to the Defendant. It is admitted all around, that the obligors were bankrupt, while the bond was in *Horn's*

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hands. *Horn* only guarantied the surplus above Plaintiff's portion. He was not bound to do so, if that bond was his ward's property, and he acted *bona fide*.—Then the loss was incurred before the Defendant had any thing to do with the paper, and not by his fault. If *Horn* had not acted faithfully, then the Plaintiff has a redress against him yet. The Defendant has none. The plain rule of right is, that the parties should be *in statu quo*. As the Defendant did not receive money from him, nor collect it out of his effects, the Plaintiff can ask only for his bond back. The Defendant must therefore assign to the Plaintiff, without liability, the judgment against *Stanton & Peel*.

As for the other dealings between the parties consequent upon the contract, they appear to be these: that the Defendant brought an action of ejectment against the Plaintiff, in which he recovered the land; and then recovered also the sum of $200 for mesne profits, in September, 1827: that he likewise sued *Horn* on his guarantee of the surplus of the bond of *Stanton & Peel* over $700 and recovered $668 63, including interest, in September 1828: that the Plaintiff had found means to get in from *Horn's* executor his bond for $424 79, in which the Defendant was surety; and that he has caused the same to be put in suit, in the name of *Henry Horn*, as executor of *Jacob*. Upon these facts, the plain equity is, that the last mentioned suit on the bond should be perpetually enjoined; and that after deducting the $200 recovered for mesne profits, with interest thereon, from the said sum of $638 63, the residue of this latter sum be paid into Court by the Defendant for the use of the Plaintiff, and that the Defendant acknowledge satisfaction of his judgment at law against the Plaintiff. As the Defendant offered to transfer to the Plaintiff the judgment against *Stanton & Peel*, and also that against *Jacob Horn's* executor, the Plaintiff must pay the costs of this suit, to be taxed by the Clerk; for which execution may be

issued, or the same deducted out of any money, which may come into the office for the Plaintiff in this cause. June 1830. Smith et al. v. Duncan.

Per Curiam.—Decree accordingly.

Elijah Scott & Susan his wife
v.
William Duncan, } From Craven.

Where a marriage settlement does not conform to the intention of the parties, either through mistake, or the fraud of one of the parties, it will be corrected by a Court of Equity.

Where however the correction interferes with the rights of the husband or wife, or issue of the marriage, it will be made with more caution, than where it affects collaterals only, who are strangers to the consideration of the deed.

A marriage settlement, which does not conform to the intention of the wife, will not be annulled, so as to leave the property subject to the legal rights of the husband; but it will be reformed by inserting the omitted provision, upon the same principles on which articles are executed.

Collaterals, who claim under a settlement procured by the fraud of their father, are excluded from any benefit under it, upon its being reformed.

This was a bill filed by the Plaintiffs to reform a settlement, made by them in contemplation of their marriage; whereby the property of the Plaintiff, *Susan*, then *Miss Kornegay*, was conveyed to the Defendant, in trust to permit the Plaintiff to have the use of it during the joint lives of himself and his wife, without being subject to his debts; and from the death of the husband, in case his wife should survive him, then, in trust for her use; and at her death, in trust for the issue of the marriage—and in default of such issue, then to the sisters of the wife, of whom the wife of the Defendant was one.

The case, both upon the bill and answer, and the proofs, is fully stated by his Honor Judge Ruffin.

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Gaston, for the Plaintiffs, cited *Osmond* v. *Fitzroy* (3 *P. W.* 131) *Cole* v. *Gibson* (1 *Ves. sen.* 503) *Huguenin* v. *Basely* (14 *Ves.* 273).

Badger, *contra*, cited *Griffiths* v. *Wood* (1 *Swanst.* 43) *Brooks* v. *Brooks* (*Prec. in Ch.* 24) *Lord Irnham* v. *Childs* (1 *Brown's Ch. C.* 92).

RUFFIN, Judge.—This bill is filed to annul or reform a marriage settlement of the wife's estate, executed on the day of marriage, in which the Defendant, *Duncan*, is trustee, upon the ground, that it was obtained by the fraud of the Defendant, or was executed by the Plaintiffs, under a mistake of the wife, relating to a material part of it. The estates are settled to the use of the husband and wife for their joint lives, but not subject to his debts or disposal; and if she survived, to her for life; and upon her death without issue living, over to her two sisters and their children.

The Defendant, *Duncan*, married one of the sisters, and his family thus have the benefit of one half of the estate, in the events just mentioned.

There is no pretence for setting aside the conveyance altogether; for it is clear that a settlement of some sort was deliberately intended by the parties.

On the other hand, it is equally clear, that if the settlement actually made does not conform to the agreement of the parties, by omitting material parts of it, through a mistake all around, or through the fraud of either of the parties to it, Equity will, upon clear proof being made of such fraud or mistake by proper evidence, rectify it.

It is material to observe, that this is not a controversy between the husband and wife, between whom the marriage is a valuable consideration. Between them, or as relates to the issue of the marriage, the provisions of the deed would be more carefully scanned, either by themselves, their friends, or counsel. A bargain is always more regarded than a gift. The difficulty here, is with

mere volunteers; who ungraciously say, they have got a donation, and will hold it at all events. They will not hold it, if it has been obtained by surprize, undue influence, and abuse of confidence, by a person trusted to have the deed drawn up, or by the mistake of the parties as to its contents.

A most important circumstance presents itself to our consideration upon first opening this case. The deed is an absolute and irrevocable disposition of the property, although made by a person who was not likely to have issue. That an absolute settlement should be made on the children of the marriage would not surprize us. We should expect that the husband would require it, and not leave it to the wife, without his consent, or that of the trustee, to appoint it away to strangers, or to the issue of another marriage. But here, issue, though mentioned in the deed, could hardly have been anticipated by a lady fifty years of age. In such a case, the want of a power of revocation and re-appointment astonishes. It is against the proneness of the human heart to retain the dominion over property. But if we are surprized at finding no such power reserved to the wife during the coverture, how much more must we be struck, when we come to see, that although the deed contemplates her surviving the husband, yet in that event also her hands are perfectly tied. Her estate does not become her own again, though her necessities may require a sale. She is not even allowed to devise it among her own relations. This deed fixes by irreversible doom the course of the lady's estate, against her own necessary use of it, and power of reasonable disposition, after discoverture: and this, not as against her own children, but as to collaterals, who are strangers to the consideration upon which it was made. It is impossible for a Court of Justice to say, that any extrinsic evidence, any thing out of the deed itself, could entirely remove the suspicion of fraud,

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or of mistake, arising from gross ignorance in the parties, which these strange omissions create. Nothing but imposition, or taking advantage of a fatuous confidence, could bring to the point of actual execution such an instrument. Upon the face of the deed, it is fraudulent.

In the case before us, the parol evidence does not weaken, but fortifies the conclusion, to which the deed itself points. The answer indeed denies the fraud. The Defendant says the husband was in debt, and he felt bound to mention it to his sister-in-law; that it was deemed by him and her an act of prudence, to secure the estate from his creditors, and also to protect her from his influence after marriage. That this was perfectly understood by her, and that in consequence of it, she, in the presence of *Scott* and the Defendant, gave the directions for the settlement, as it was drawn. Admit this; and it yet remains to be accounted for, why she is left in bonds after her husband's death. But passing that by for the present, let us see how the facts are in relation to the wishes and directions of the wife. After they were given, the Defendant admits, that he and *Scott* were to attend Counsel together to communicate them; and that before they left the Defendant's house, *Scott* told him, that he understood them differently. As he understood the lady, a power was to be reserved to her, notwithstanding the coverture, to dispose absolutely of the estates. This would have been an extraordinary power, which the husband would not readily have agreed to, if issue had been expected. But not anticipating that, it would have argued an improper design on the part of the husband, since it would have left the wife too open to his persuasions or his compulsion. The truth is, all the parties seem to be very uninformed people. I have no doubt, that the substance was, that a *proper* power of revocation and appointment was to be inserted, and the parties meant to leave it to Counsel to settle; whose duty in such a case is, obviously, to frame it, as this Court

would do, if such a stipulation rested in articles. Upon the objection of *Scott*, reference was again had to the lady; and the Defendant says, she confirmed her former instructions, and *Scott* expressed his satisfaction. The account then given in the answer is, that he and *Scott* went together to *Mr. Stanly* to draw the deed; that there the same difference occurred, when they resorted to the lady for the third time; that she repeated her former words, whereupon, *Mr. Stanly*, in conformity thereto, and with *Scott's* privity, drew the deed, which was read and explained to *Mr. Scott*, who perfectly understood it, and freely executed it. The answer, it is thus seen, unequivocally asserts, that the lady did not wish any power of disposition to remain in herself; but at three different times, and in contradiction to the pertinacious contention of the intended husband to the contrary, gave her instructions to omit such a clause. How does this correspond with other facts given in evidence? It is true, that there was no person present at the time the instructions were given; so that the answer cannot be directly contradicted. But a witness swears, that a few days after the marriage, the Defendant told him, that he had got the property settled on his children and others, so that *Susan* or her husband could not sell it; that a woman was a weak vessel, and could not be trusted; that she signed against her will, but that after hard work, he got things done pretty much as he wished. It appears from other depositions, that this controversy was discussed in the religious society, to which the parties belonged. Their minister and some of their brethren testify, that the Defendant did expressly admit, in the society, that *Miss Kornegay* gave the instructions stated by *Scott* to *Mr. Stanly*; but that he, the Defendant, knew she decided so merely in favor of her lover, and against her own interest; that he was her friend, and felt bound to protect her, and therefore had the settlement drawn in the shape it was, and would not relinquish it. These are subse-

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quent declarations; and although they contradict the answer, point to point, we should not feel safe in decreeing on them alone. But *Mr. Stanly*, who drew the deed, says, that when *Scott* and *Duncan* first applied to him, that both seemed wholly ignorant of the nature of the intended settlement. They did not then disagree as to her wishes, but were without information. He sent them back to consult the lady. They returned, and *Scott* represented, that she wished the estates settled on herself, so that she might dispose of them, notwithstanding her coverture; while *Duncan* insisted, that she desired it to be on her husband and herself for their joint lives, and herself for life, if she survived, with a vested remainder to her relations. This produced an altercation, which induced *Mr. Stanly* to request that the lady herself might attend him, which they declined. Why was he not requested to visit her? Why was the lady debarred from an interview with Counsel? *Mr. Stanly* then suggested different provisions, and made a memorandum of them—which *Scott* and *Duncan* assented to. He then drew the deed, and delivered it to *Duncan*, with instructions to have it read and *explained to the lady*. Is it not clear, from this explicit statement of the intelligent gentleman, who was consulted by these men, that the deed was framed, either *against* the instructions of *Miss Kornegay*, or *without* them? Can there be a material difference, in a case of this sort, which was the fact? But a circumstance occurred at the execution of the paper, which leaves no doubt, that the representation, in the answer, of her wishes, is absolutely false. The Defendant says, that the lady wished not to have the power of disposition. Adhering to the letter of *Mr. Stanly's* instructions, and to that only, he did not request this, or any other legal gentleman, to give the explanation, but procured a neighbour, just before the marriage ceremony, to read it. *Mr. Lentz*, who is one of the subscribing witnesses, was the person selected. Now he and the

other witness both say, that when he began to read it, *Miss Kortegay* asked, "*whether she could still do as she pleased with her property?*" Can there be the least hesitation after this, that her instructions were for a power of revocation or disposition? But it is then a reliance, that the deed was read over to her: and it is argued, that a mistake of its legal operation could not be averred. It is clear, that where the parties are perfectly aware of the actual contents of a deed; and each acting on his own judgment, or that of his Counsel, omit to insert a clause, for fear it may affect the deed in law, they cannot be helped. But here the question is one of imposition and abuse of confidence. The very enquiry is, whether she did, in fact, know and understand what was in the deed, and what not? It was read to her, it is true. But what a time to produce a complicated marriage settlement to an uninstructed female, dressed for her marriage! Was it read to her, in the hope that she would, or would not understand it? To whom could she apply for advice, but the very person who had contrived the imposition on her? I wonder that she had not signed and sealed without a question. But even at that moment, the strong desire of controlling one's own property showed itself, and prompted the question, "can I still do as I please with my property?" The answer given by the witness was, "yes, you can; but *Mr. Scott* cannot." This was all she wanted; and in confidence of that, she was willing to execute the deed. It was read through; but can it be supposed that she heard it, or hearing it, comprehended it? The man who was bound, in honor, conscience and law, to advise her, was silent, and fostered the deception.

The evidence then, out of the deed, goes beyond a naked confirmation of the inference from the deed itself of a mistake. It proves actual and deliberate imposition by the Defendant. All his rights therefore, and all the benefits resulting to the sisters and their children from this

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imposition must yield to the superior equity of this lady to have the settlement reformed. (*Huguenin* v. *Basely* 14 *Ves.* 289.)

But it is argued, that the Court cannot reform this settlement, without inserting a clause which will render the whole deed nugatory; as it will place the wife in the husband's power. This bill is called the husband's bill; because the wife is sunk in him during the coverture, and her wishes cannot be known. The rights of husband and wife are not in conflict in this suit, or touching the matter of it. He derives no benefit under the settlement, and no decree can be had against him. The Court indeed would not set aside a settlement upon such a bill, and let the husband in to his legal rights. As to reforming it, the Court will take care to secure the interest of the wife, so far as consistent with the true spirit of the intended provision, which has been omitted. Here, that was a power of disposition to the wife during coverture. That she is now entitled to. But as we cannot suppose, that it was meant to be of such a general character, as would leave her at the mercy of her husband, it must be so restricted as to protect her. If her real wishes had been laid before the conveyancer, he would certainly have declared a trust for her in fee of the lands, and in absolute property of the chattels, upon her becoming *discovert*; and also, a power of revocation and of appointment by will, or a paper writing, properly attested by two credible witnesses, in the nature of a will, executed during the coverture, in case she died during the lifetime of her husband. This at once reserves to her a reasonable control over her own estates, and secures the free exercise of it, as far as it is now possible to be done, except by super-adding the consent of the trustee. That would be done, if the Court had a faithful one before it. But this trustee has already so far abused his relation to the Plaintiff, and the confidence reposed in him, that no discretion can be allowed to him. The Court decrees

therefore, that the marriage settlement be reformed in the particulars mentioned; and that a conveyance be made to such trustees as the Plaintiffs, with the approbation of the Clerk, may select, to be executed by the Plaintiffs and Defendant, and the trustee to be selected, in which trusts to that effect shall be declared; which deed shall refer to the deed in the pleadings mentioned, and to this decree, and be settled and approved by the Clerk of this Court, and acknowledged before a Judge of the Superior Court or of this Court; and that the Defendant pay all the costs of this suit.

PER CURIAM.—Decree accordingly.

David Woods
v.
William Hall and
Rankin McKee,
} From Orange.

A misrepresentation by the vendor of a fact which materially affects the value of the property sold, and of which the vendee is ignorant, avoids the sale.

The employment of a puffer at an auction sale is a fraud upon the bidders; and a Court of Equity will direct a bond, given by a bidder for property bought under such circumstances, to be delivered up.

The Plaintiff alleged, that in July, A. D. 1819, being at a tax gathering, a tract of land belonging to the Defendants, as tenants in common, was by them exposed at auction, the Defendant, *Hall*, being the auctioneer—that the land was represented to be fertile, and well adapted to the culture of tobacco—that there was a never-failing spring on it, and that it was, in all respects, an eligible situation for a settlement. That being anxious to locate one of his sons for life on land of the kind thus described, he mentioned his views to the Defendant, *Hall*—that the

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Plaintiff knew nothing of the land, and became desirous to purchase, solely from the description given of it by *Hall*—that the sale was opened late in the day, at which time, he, the Plaintiff, was drunk—that the Defendant, *Hall*, perceiving his situation, after describing the land, as above, cried it at $500—that the Plaintiff asked whose bid that was, and was informed by *Hall*, that one *John Jordan* was the bidder—that the said *Jordan* was present and did not deny it—that believing *Jordan* knew the land, and confiding in his judgment, the Plaintiff was induced thereby to yield implicit confidence to the representations of *Hall*, and thereupon bid one dollar more, when the land was struck down to him—that believing *Jordan* to be an actual bidder, and fully confiding in the description of the land, he executed two bonds for $250 50 each, payable in one and two years, according to the conditions of the sale, and received a covenant for a title. That soon after, he ascertained the land not to be of the quality usually called tobacco land, and that there was no spring upon it, except one which regularly failed in the summer. And further, that several months after the execution of his bonds, he had discovered that *Jordan* was not a real bidder, but had been employed by the Defendants to run up the price of the land which had fallen upon the Plaintiff—that upon all these grounds, the Plaintiff had determined not to pay his bonds, and had notified the Defendants thereof, who had brought an action, and recovered a judgment. The prayer was, that the contract might be vacated, and the Defendants enjoined from suing out execution upon their judgment.

The Defendants, in their answers, denied any intention of defrauding the Plaintiff, or any body else—averred, that the land and spring answered the description given of them; and although they admitted the employment of *Jordan* to bid for them, they urged that being

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tenants in common, they had determined to sell for the purpose of partition, and that the Defendant, *Hall*, intending to take the land in severalty, unless it went for $880, authorized *Jordan* to bid for him up to that price.

Much testimony was taken, which it is not necessary to state, as all that is important will be found in the opinion of his Honor Judge HALL.

Badger, for the Plaintiff, cited *Parsley* v. *Freeman* (3 *T. R.* 51) *Eyre* v. *Dunsford* (1 *East* 318) *Evans* v. *Bicknell* (6 *Ves.* 174) *Burrows* v. *Lock* (10 *ditto* 470) *Clifford* v. *Brooke* (13 *ditto* 131) *Hill* v. *Buckley* (17 *ditto* 395) *Codman* v. *Horner* (18 *ditto* 10) *Deverell* v. *Ld Bolton* (*ditto* 505) *Drewe* v. *Corp* (9 *ditto* 368) *Wall* v. *Stubbs* (1 *Mad. R.* 80) *Duke of Norfolk* v. *Worthy* (1 *Camp.* 337) *Bacon* v. *Bronson* (7 *Johns. Ch. R.* 201) *Oldfield* v *Round*, (5 *Ves.* 508) *Higginson* v. *Clowes* (15 *Ves.* 523).

Nash & *Winston*, for the Defendants, cited *Bramley* v. *Alt* (3 *Ves.* 630) *Cowdly* v. *Parsons* (*ditto* 625 n.) *Smith* v. *Clark* (12 *do.* 477) *Calverly* v. *Williams* (1 *Ves. Jr.* 210) *Culcraft* v. *Bochuch* (*do.* 221) *Grant* v. *Brunt* (*Cowp.* 177) *Legge* v. *Crocker* (1 *B.* & *B.* 515) *Twining* v. *Morison*, (2 *Bro. C. C.* 326).

HALL, Judge.—Two principal reasons are urged in this case, against carrying the contract into effect, which the Plaintiff made for the purchase of the land in question. The first is, that the Defendant *Hall* imposed upon him by false representations, as to the land having a good spring upon it. The other is, that he was imposed upon by the same Defendant, in employing puffers at the sale.

It appears, that the tract of land contained one hundred acres; and it is established by nearly all the witnesses whose depositions have been read, that the Defendant *Hall* represented the land as having a never failing spring upon it. For this purpose the depositions of *John Kay*, *John Hanks*, *William Crosset* and others have

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been read. It has also been proved by the depositions of *James Ray, John Hanks, William Crossel, John Cummins and Jesse Clark*, that there was not a never-failing spring upon it. *James Ray* says, he went upon the land with the Defendants after the sale, to ascertain whether there was a spring on it; that they found none; that at the place, where it was supposed the spring was, there was not the appearance of any. It appears from the depositions, that the spring had generally run a part of the year, but dried up in August or September; which without the aid of a well would altogether render it unfit for a settlement. This charge of misrepresentation is established beyond doubt, without any conflicting testimony. Whether there was a spring on the land or not, was a circumstance, on which the value of the land, as a settlement, much depended. It was a circumstance too, with which the Plaintiff might have been unacquainted, altho' he lived in the neighborhood. The Defendant says, he had been informed there was a good spring on the land. If he had made that representation as from information, the effect upon the Plaintiff might have been different. But there is a marked difference between a representation founded upon belief, or upon the information of others, and a representation that a fact is so.

It appears further from the depositions of *Richard Nichols* and *John Jordan*, that each of them was requested by Defendant *Hall*, to bid as far as $500: that he would take such bid off their hands. *Jordan* says, the land was put up at $500, and he heard it cried at that sum. And the Defendant *Hall* admits, that the Plaintiff asked whose bid it was, and was informed by him that it was *Mr. Jordan's* bid: that the Plaintiff afterwards bid one dollar more, and the land was knocked down to him.— This was undoubtedly a fraud upon the purchaser, when it is considered how much men's conduct and acts are influenced by the judgment and opinion of others. And so thought the Defendant, or why did he resort to it?

It was thrown out that it was *Jordan's* bid; in other words, that *Jordan* thought the land was worth $500, and had bid that sum for it. I say it was thrown out as a bait, to induce *Woods*, intoxicated as he has been represented to be, to bid a greater sum. But *Jordan* says he had made no bid. Then no bid whatever had been made for the land, until the Plaintiff bid $501. The representation then, that *Mr. Jordan* had bid $500, was totally without foundation. With respect to what was said about the quality of the land, the Plaintiff lived in the neighborhood, and ought to have acquainted himself with that. It was a matter of judgment. There can be no ground of relief on that account. In questions of fraud, it might be a circumstance proper to be considered.

The two principal charges in this case, I think, are established: 1st, the misrepresentation, as to the land having a never-failing spring upon it: 2d, the charge of employing puffers at the sale. I think the Defendants should be enjoined from further proceedings in the suits, by them brought upon the bonds given for the purchase money of the land; and that they should pay the costs at law, as well as the costs of this Court.

PER CURIAM.—Let the injunction be perpetuated.

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Rebecca Bailey et al.
v.
Thomas Shannonhouse ex'r of Thomas Davis, } From Pasquotank.

To a bill against the executors of an executor, by the legatees of the first testator, a plea of the act of 1715 (*Rev. c.* 2) barring claims against dead men's estates unless made within seven years, is not available, without an averment that the residue of the estate had been paid to the Trustees of the University.

The bill was filed in March, 1828, by the legatees of *Benjamin Bailey*, for an account of his estate, and the payment of their legacies.

It averred, that *Benjamin Bailey* died in the year 1811, having made his will, whereof he appointed the testator of the Defendant and another executors—that the testator of the Defendants alone proved the will in March, 1812, and took into his possession all the personal estate, and under a power conferred by the will, sold a valuable plantation, and received the purchase money—that the executor acted for many years as the guardian of those of the legatees, who were infants—that he died in the year 1817, having made his will, which was proved by the Defendant, whom he appointed executor.

The Defendant pleaded, "that the said *Thomas Davis*, "this Defendant's testator, died more than seven years "before the filing of the Plaintiff's bill, to-wit, at, &c. "in the year 1817; nor has the Defendant, at any time "since the death of his testator, promised or agreed to "come to any account with the Plaintiffs, or make any "satisfaction, or pay any money for or on account of his "aforesaid testator, and therefore this Defendant doth "plead the act of Assembly in that case made in the year "1715, for the limitation of actions brought by creditors "against any person deceased, and prays that he may "have the benefit of the same, and pleads the same in "bar of so much of the Plaintiff's bill as calls for an "account of, &c. and prays judgment," &c.

His Honor Judge DANIEL sustained the plea, and dismissed the bill—whereupon, the Plaintiffs appealed.

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Bailey v. Shannonhouse.

Hogg, for the Plaintiffs.

Devereux & Kinney, contra, cited *Beckford* v. *Wade*, (17 *Ves.* 86) *Hamilton* v. *Shepperd* (3 *Murp.* 115) *Hollowell* v. *Pope* (2 *Murp.* 108) *McIntyre* v. *Carson* (2 *Hawks* 544) *Cook* v. *Streator* (1 *Dev. Eq. Cases* 324) *Rayner* v. *Pearsall* (3 *Johns. C. R.* 578).

HALL, Judge.—In the present case, there is no question raised as to the right of property. The Plaintiffs seek that which was their father's, and which by will he bequeathed to them; and in the bill are included the fair claims of the widow, derived from the same source.—Whether these claims are barred by the statute of limitations, and given to an executor, it is our province to consider.

By the ninth section of the act of 1715 (*Iredell's Rev.* c. 48) any remnant of an intestate's estate, that remained in the hands of an administrator, unexhausted by creditors, and not claimed by the next of kin, is directed, after seven years, to be paid to the churchwardens and vestry, for the use of the parish. By the act of 1784, (*Rev.* c. 205) such balance in the hands of an administrator, when his administration shall be finished, and no further demand shall be made by creditors, shall be deposited in the treasury, subject to the claim of creditors and the representatives of the deceased, without limitation of time. Suppose however, that an administrator does not pay over such surplus to the treasury, as he ought to do. As the representatives of the deceased can have no claim against the treasury, it follows, that such administrator will be liable after seven years, because if he had done his duty, the treasury would be liable without limitation of time; and the administrator should not become the owner of the property, as a reward for his delinquency.

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By the act of 1809 (*Rev. c.* 763) it is made the right of the trustees of the University to receive, and the duty of executors and administrators to pay to them all sums of money, or other estate of whatever kind, that shall have remained in their hands for seven years after their qualifications respectively, unrecovered by creditors, legatees or next of kin of their testators or intestates. And the trustees are authorized to hold the same absolutely, unless a just claim shall be made for the same within ten years thereafter. If, in the present case, the Defendant had added to his plea, that he had delivered over to the trustees of the University the estate in question, the Plaintiff might have applied for it to the trustees at any time within ten years. But to hold on upon it, against the just and equitable claims of the Plaintiffs, when the executor cannot claim the semblance of a beneficial interest in it, is what the act of 1715 never contemplated. The decree therefore, made in this case in the Superior Court, must be reversed.

PER CURIAM.—Let the decree be reversed accordingly.

William S. Blackledge et al.
v.
Jordan Nelson et al.
} From Pitt.

Upon a bill to foreclose or redeem a mortgage, its existence being admitted, a reference for an account of the amount due upon it is an order of course. Questions respecting that amount properly belong to the account, and are only heard upon exceptions to the report.

This was a bill filed to foreclose a mortgage, which the Defendant, *Nelson*, gave to the Plaintiffs to secure the sum of $3,000—the purchase money of the mortgaged premises. Payment of the purchase money was originally

made by an assignment of bonds, which the Defendant guarantied, and the mortgage was given to secure that guarantee.

The decree was resisted upon two grounds.

1. That the title to a part of the land had turned out to be bad, and that the Plaintiffs had, by the agreement for the sale, bound themselves to a general warranty; but in executing the deed, had imposed upon the purchaser by a clause of special warranty only.

2. That the bonds were good when they were passed to the Plaintiffs, and had been lost by the negligence of the mortgagees, or their indulgence to the debtors.

Upon the first point, no evidence was filed by the Defendants. But the Plaintiffs proved, by the deposition of *William Blackledge*, that the deed was in strict conformity to the agreement for a purchase. Upon the second point, evidence was filed by both parties, but at present it is not necessary to state it.

The case was argued by *Hogg*, for the Plaintiffs, and by *Gaston*, for the Defendants,

RUFFIN, Judge.—The Court does not decide the second point in this stage of the case. Upon a bill to redeem or foreclose, when the mortgage is established, unless the parties agree to a decree upon the answer, it is the established law of the Court, that a reference to the Master, to ascertain what is due on the foot of the mortgage, is of course, upon the motion of either party. The Court therefore does not enter upon the question of the solvency of the obligors in the bonds transferred; or of the *laches* of the Plaintiffs. Those matters will come up, when the report comes in. They properly belong to the accounts to be taken; and it might be a surprize to both parties to enter into them now, as they may not have prepared their testimony to those points, expecting to offer it before the Master. The usual reference is therefore ordered.

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Haines v. Cowles et al.

PER CURIAM.—Declare that the conveyance made to the Defendant, *Nelson*, with a covenant of special warranty only, conforms to the agreement of the parties, and decree that the Plaintiffs are barred of relief, by reason of any defect of title in a part of the land conveyed by them to *Nelson*, if such defect exists, and direct an account of what is due the Plaintiffs for principal and interest on the mortgage, including such costs as they have necessarily incurred, in prosecuting suits on the bonds assigned by the Defendant, *Nelson*, to them.

Thomas Haines
v.
Josiah Cowles and
Ephraim Hough,
} From Surry.

One who has conveyed his property, in trust, to secure his own debt, and has assented to a sale of it upon disadvantageous terms, cannot, in Equity, obtain a re-sale of it, although it was purchased by the creditor whose debt was secured.

But other creditors, who have been injured by the sale, will be aided.

The case made by the bill, answers and proofs, was, that the Plaintiff being indebted to the Defendant, *Cowles*, in the sum of $590, and to other persons to the amount of $400, made a conveyance of all his property to the Defendant, *Hough*, upon trust, to secure the debt due the Defendant, *Cowles*, with a power of sale, in case of a default of payment by the Plaintiff—that after a default, the Defendant, *Hough*, by the directions of *Cowles*, and with the consent of the Plaintiff, sold the property assured in trust, for cash, at a ruinous sacrifice, insomuch, that although amply sufficient to discharge all the debts of the Plaintiff, it was purchased by the Defendant *Cowles*, for a sum less than his debt. And that one

Allison, who was a creditor of the Plaintiff, and attended, the sale, offered, if all the property was sold in one lot, to bid for it the amount of his own debt and that of the Defendant, *Cowles*. The prayer of the bill was, that the property might be re-sold, under the superintendance of the Master, and the Plaintiff declared to be entitled to the surplus, over and above the debt of the Defendant *Cowles*.

Devereux, for the Plaintiff.

Gaston, for the Defendants.

HALL, Judge.—It does not occur to me, that there is any ground on which the Plaintiff can be relieved in this case.

The property, which was sold under the deed of trust was conveyed to the trustee by him for that purpose. There is no evidence in the case that supports the charge, that the sales of the property were fraudulently conducted, to the Plaintiff's prejudice. It was sold for cash, agreeably to the terms of the deed of trust, to which the Plaintiff had given his assent, and whether it sold for much or little, there can be no remedy for him. If he and *Cowles* had combined to defraud *Haines'* creditors, and on that account the property had been sacrificed, he, being a *particeps criminis*, could have no remedy, although the creditors defrauded would have a fair claim to one.

The Plaintiff probably had it in his power to pursue a course more favorable to both himself and creditors; that is, to have the property sold on a credit. Where a debtor conveys his estate to one creditor by deed of trust, to secure him only, and the property is stipulated to be sold for cash, and not on a credit, in which other creditors are likely to suffer a loss, I think, in such a case, a Court of Equity would lend its aid to prevent such injustice. But this is not that case. No creditor has applied for relief.

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If *Allison* had paid off *Cowles'* debt, or tendered it, and it had not been accepted, he might have had a remedy against the property in *Cowles'* deed of trust. But *Allison* only proposed to make a bid for the property to the amount of *Cowles'* and his own debt; and speculated himself into whatever balance might have remained of the property after those debts were satisfied, without any regard to the interest of other creditors. But these remarks are altogether inapplicable to the prayer of the Plaintiff for relief.

PER CURIAM.—Let the bill be dismissed with costs.

Isaac Cannon et al.
v.
John Jenkins et al. adm'rs. of Charles Jenkins & Jesse Rountree, adm'r of Wm. Rountree. } From Pitt.

An executor who buys at his own sale, however openly or fairly, holds the property at the election of the legatee, and one who purchases in conjunction with him, is subject to the same rule.

But where an executor at his own sale bid fairly, for the purpose of enhancing the price, and the property being struck off to him, sold it the same day, without collusion, to one who had bid against him, although the executor would have held it subject to an account, yet his purchaser, the sale being a distinct transaction, acquired an absolute title.

Sales of slaves in lots are not favored in Equity, because slaves generally sell better singly; and the person who conducts such sales does it at the peril of answering for the true value. But where the slaves are sold in families, although the executor has no right to consult his feelings at the expense of the legatees, yet he will not be charged the full value, unless the interest of the legatees is manifestly injured by the mode of sale.

Executors are justified by sales at auction in the usual way. But if they depart from this method, and sell at private sale, they are answerable for the full value.

The representatives of an administrator cannot be compelled to account with any person, but an administrator *de bonis non*.

The case of Hyden v. *Jones* (1 *Hawks* 497) approved by RUFFIN, Judge.

The Plaintiffs, who were the legatees of *Willie Cannon*, alleged, that the said *Cannon* died, having published his will, which was proved by the intestate *Charles Jenkins*, to whom letters of administration, with the will annexed, issued, the executor therein appointed having renounced: That directly after the issuing of the letters of administration, the administrator, under the pretence of executing the will, but with an intention of fraudulently making a profit to himself, advertised four young negroes, viz. *Jacob*, *Phil*, *Tom* and *Sam*, who were directed by the will to be sold upon a credit of ten days: that in pursuance of this fraudulent intent, and to prevent the said slaves from bringing their value, they were sold in one lot, and were bid off by the administrator himself, at the price of $1,025—that *William Rountree*, the intestate of the Defendant, *Jesse*, was present at the sale of the slaves, and immediately thereafter took the whole of them into his possession. The Plaintiffs averred, that the whole of this transaction was a pretence, to cover the profit made by the administrator upon a private sale of the negroes by him to *Rountree*; and they prayed that the sale might be declared to be void, and the Defendant, *Jesse*, decreed to be a trustee of the slaves for their benefit, and that the administrators of *Charles Jenkins* might account with them for their intestate's administration of *Willie Cannon's* estate.

The answers denied altogether the agreement between *Jenkins* and *Rountree*, as charged. The Defendants admitted, that the four negroes were offered together at public sale; but they stated the reason to have been, that they were four *brothers*, whereof the eldest was not more than eight, and the two youngest twins, about four years of age. They also admitted, that at the public sale, *Jenkins* became a bidder, and the last bidder at $1,025. But they stated, that he bid only for the benefit of the estate, and to run up the property; that he did not intend to make, nor did he make any advantage to him-

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self by the purchase: that the bidding was not collusively for the benefit of *Rountree*, for that *Jenkins* and *Rountree* were bidders against each other: that the credit of that sale was six months, and not ten days: that it was fairly conducted—*Jenkins'* bids openly given, and dwelt upon by his directions, and that he urged persons to bid upon himself: and finally, the price at which the negroes were knocked down to *Jenkins*, was a fair and full one: and that after *Jenkins* was declared the purchaser, and on the same evening, he sold the negroes at the same price to *Rountree*, who immediately gave his bond, received the negroes, and held the exclusive possession, for his sole use, up to his death, nearly thirteen years afterwards.

The administrators of *Charles Jenkins* denied that any thing was due from their intestate to the Plaintiffs, but submitted to an account. Upon replication, proofs were taken, the substance of which is stated in the opinion of his Honor Judge RUFFIN.

Gaston, for the Plaintiff.

Hogg & Mordecai, for the Defendants.

RUFFIN, Judge.—The bill is framed upon the rule in *Ryden* v. *Jones* (1 *Hawks* 407) and moreover charges an actual fraud in the purchase by *Jenkins* at under value, by means of a sale of all the negroes in a lump, on ten days credit. The doctrine of that and similar cases is recognized throughout. An executor buys at his own risk; and no matter how openly, nor for how full price, he holds purely at the election of the legatee. Nor could this case be distinguished from those, by the introduction of *Rountree*, as a third person, provided he purchased in conjunction with the administrator. He who knowingly connects himself with a trustee in a breach of trust (and he must do it knowingly, if he purchase from him on joint account) must abide the fate of his faithless companion, whatever form the transaction may assume.

His Honor, after stating the substance of the answer, as above, proceeded: Without scanning the de-

positions minutely, it is sufficient to say, that the answers are fully sustained by the proofs. And the witnesses disclose another fact not mentioned in the answers, which strongly rebuts the charge of collusion; which is, that *Jenkins's* last bid was $25 upon that of *Rountree* of $1,000. Every person present, members of the family as well as strangers, thought the whole business fairly conducted; and in particular, a lady, who is taken to be the widow of the testator, urged *Rountree* to purchase, as he already owned the mother of the boys. From this state of the facts, it is manifest, that the case is not within the principle upon which the bill goes. If indeed the case of the Defendant, *Rountree*, rested upon the purchase by *Jenkins*, it would necessarily give way; for as affecting the title to the slaves, that is a mere nullity. Such indeed seems to have been as much the actual intent of *Jenkins*, as it is the conclusion of law. He did not design a purchase for his own benefit. He did not for a moment claim an individual interest. But being desirous of obtaining the best price, he run the property up against *Rountree*, until it finally fell on himself; and finding that he was unable to screw *Rountree* higher, he afterwards sold to him for the same price. *Rountree's* purchase was therefore a separate and distinct transaction; of which the validity is not dependent upon the previous purchase of *Jenkins*, but upon the general authority of the latter, as administrator, and the actual *bona fides* of the parties in this last and only real sale. And there seems to be nothing in the conduct of the purchaser, that can taint his title. It is to be expected, that he will buy as low as he can; and he is not to advise in what lots the property is to be offered, nor be responsible for an injudicious arrangement. If indeed the smallness of the price, the insolvency of the executor, or in a word, the whole face of the proceeding, showed a collusion between the vendor and vendee, Equity would reach the property. But there is no pretence for that here; for an

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inadequate price essentially enters into that proposition; and all the witnesses prove, that the sum of $1,025 was the full value of the negroes, as they were purchased by *Rountree*, namely, *in one lot*. Nor could the price have altered *Rountree's* right, notwithstanding the sale in a lump, had he purchased at a public sale, otherwise fairly conducted. The bill must therefore be dismissed, as against the administrator of *Rountree*, with costs.

A sale in the lump may be attended with very different consequences to the administrator himself. The Court does not favor sales by executors in large masses. Most commonly the articles sell best, singly; and therefore, they ought, in general, to be so offered. It is not exactly like sales by Sheriff, which ought to be most strictly watched; for as only so much as will satisfy the execution ought to be sold, so only so much as will probably satisfy it, ought to be set up. In sales by executors, the whole is to be sold at all events, by the terms of the will. And it is the duty of the executor to get the most he can. Sometimes, indeed, as much, or more can be had, when the property is disposed of in one, than in more parcels, as in the instance of a *family* of slaves, when the children are *all* of tender years. But he, who conducts such a sale, does it at his peril, and must answer for the true value, where the price has been materially affected by the mode of sale. It would certainly have been harsh to separate these four boys, and sever ties which bind even slaves together. True, it must be done, if the executor discovers that the interest of the estate requires it; for he is not to indulge his charities at the expense of others. But the Court would not punish him for acting on the common sympathies of our nature, unless in so doing he hath plainly injured those, with whose interests he stands charged.

This doctrine however does not directly apply to the case before us; for it can only embrace sales regularly made by auction, according to the common course. If

the executor sell in that way, the price actually obtained is his justification, unless it has been diminished by his mismanagement or fraud. But if he take upon himself to depart from his plain line of duty by selling by private contract, he makes himself responsible for the true value, without reference to the price obtained, unless perhaps in very extreme cases of necessity. In such case, he can derive no help from the fact, that he disposed of each single article by itself; nor suffer detriment from selling the whole together. In each case, he puts himself upon the single point, that as much, or more, has been got in that way, than could have been got by auction. In this respect only, is the purchase of *Jenkins* at his public sale material in this case. Under the circumstances proved, it is deemed a fair criterion of the highest price. Besides that, all the witnesses think it a fair one, and some of them that it is higher than the real value, and that nobody but *Rountree*, who owned the rest of the family, would have given as much, if the negroes had been severally sold. Indeed, it speaks for itself, being $256 25 each, for little children. The Court, therefore, cannot but approve of the conduct of the administrator before us.

There is a prayer, in case the Plaintiffs cannot recover the slaves themselves, for an account of the *proceeds*. This involves a general account of *Jenkins'* administration—an account, to which the next of kin have no primary right, but only the administrator *de bonis non* of the testator; and he is not made a party. In strictness, as the cause has been brought to a hearing without him, the bill might be dismissed; and perhaps it ought, as no application was made for an account before filing the bill, and the main scope of it touches the title to the slaves, and is wholly groundless. But as *Jenkins'* administrators submit in their answer, to an account with the Plaintiff for their shares, without making objection to the want of parties, the Court will permit the cause to stand over,

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as to the administrators and next of kin of *Charles Jenkins*, a reasonable time for amendment. But in the mean while, these Defendants are entitled to their costs up to this time.

Per Curiam.—Declare that *Charles Jenkins* did not purchase, and did not intend to purchase, at the public sale made by him, the slaves in the pleadings mentioned, for his own use, or that of *William Rountree*; but that he bid, merely to run up the price for the benefit of the estate of *Willie Cannon*; and declare further, the said purchase by *Jenkins* to be merely void. Declare further, that on the day of public sale, and after it, *William Rountree* purchased from said *Charles*, as administrator, for a valuable consideration, and without collusion, by a new agreement, distinct from the purchase aforesaid of said *Charles*—and decree, that the bill be now dismissed, as against the Defendant, *Jesse Rountree*, with costs.

Declare further, that the said *Charles* is liable to the estate of his testator for the actual value of said slaves, because he did not sell them at auction; but that the said price obtained from the said *Rountree*, was a fair and full one, and therefore the Court doth, under the circumstances, approve of the sale to the said *William*, at that price.—And because the Plaintiffs cannot proceed to the taking of an account of the estate of the testator, which came to the hands of said *Charles*, without having the administrator *de bonis non* before the Court, let the cause be retained, as against the other Defendants, with liberty to the Plaintiffs to add parties, &c.

June 1830.

Reuben Moore
v.
Jeremiah Hylton and Henry Chamblis, } From Stokes.

Wherever the debtor, by the terms of the contract, can avoid the payment of a larger, by the payment of a smaller sum at an earlier day, the contract is not usurious.

In such case, the larger sum becomes a penalty, against which Equity will relieve.

To constitute usury, the obligation to pay more than legal interest must be absolute upon the face of it.

Where the holder of a bond for the payment of a certain sum, promises to surrender the bond upon the payment of a less sum at an earlier day, to take advantage of such promise, there must be a strict compliance on the part of the obligor.

An injunction is not dissolved of course upon the coming in of the answer, in which the Plaintiff's whole case is denied. The statement of the Defendant must be at least credible. Any evasion in not responding to the material charges in the bill, or an extreme improbability in the statement of the Defendant, will induce the Court to retain the injunction.

The Plaintiff alleged, that in the month of January, 1820, he purchased of one *Levi Loyd*, the agent of the Defendant, *Chamblis*, a stallion—that *Loyd* gave a certificate of the pedigree of the horse, and also of his age, which was stated to be eight years—that the price given was $400, for which the Plaintiff executed his bond, which was delivered by *Loyd* to *Chamblis*—that soon after the Plaintiff discovered that he had been grossly deceived in the age of the horse, and notified *Chamblis* that he would not pay the bond given upon the purchase—that after receiving this notice, *Chamblis*, accompanied by the Defendant, *Hylton*, came to the house of the Plaintiff, where *Chamblis* admitted the horse to be much older than had been represented to the Plaintiff, and expressed his surprise that *Loyd* should have made such a statement—that it was then agreed between the Plaintiff and *Chamblis*, in consequence of this misrepresentation, that $100 should be deducted from the Plaintiff's bond,

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and that the Plaintiff should pay the residue in a short time—that the Plaintiff then applied to the Defendant, *Hylton*, to lend him $300 to pay off the balance of the bond, who agreed to advance it, if the Plaintiff would come to his house the next day—that when the parties met, *Hylton* insisted upon having the Plaintiff's bond assigned to him, which being done, he paid to *Chamblis* $300, and agreed that the Plaintiff should have the benefit of the deduction stipulated for by *Chamblis*, and then executed the following memorandum: "I oblige myself "to deliver to *Reuben Moore* his bond of $400 given to "*Levi Loyd*, on the payment of $300 by the 20th of "June, 1820." The bill then charged, that *Hylton* had commenced an action in his own name upon the Plaintiff's bond, had recovered judgment, and was pressing an execution for the whole amount of it—the prayer was for an injunction, as to $100 of the debt.

The Defendant, *Chamblis*, in his answer, admitted the sale of the horse, through the agency of *Loyd*, as charged in the bill—that the bond was made payable on the 25th of December, 1820, and was by *Loyd* left with the Defendant, *Hylton*, for collection—that in May following the sale to the Plaintiff, he, the Defendant, went from his residence in Virginia to the house of the Defendant, *Hylton*, in Stokes County—when both of them went to the house of the Plaintiff—that he, *Chamblis*, being then in want of money, on the way offered to sell the Plaintiff's bond to *Hylton*, but that no bargain was then made—that after their arrival at the house of the Plaintiff, he, *Chamblis*, and the Plaintiff had some private conversation, in which the Plaintiff complained that the horse was more than eight years old—that he, the Defendant, stated the age of the horse to be twelve years, and that *Loyd* was not authorized to represent the horse to be only eight—that the Plaintiff insisted upon having some deduction from the bond, on account of the misrepresentation of *Loyd*, which was refused by him—but that he then in-

formed the Plaintiff, as the bond had a considerable time to run, and he, the Defendant, was much in want of money, he would take for the bond $300, provided it was promptly paid—that the Plaintiff then agreed, if he could borrow the money, he would, either that evening or the next morning, pay $300 and take up his bond—that he believed the Defendant, *Hylton*, had the money, and he would endeavour to borrow it of him—that the Plaintiff applied to *Hylton* to lend him the money, but the Defendant did not know what passed between them, further than that it was then agreed, that the parties should all meet the next day at *Hylton's* house, when he, *Hylton*, refused to lend the Plaintiff any money, but bought his, the Plaintiff's, bond of him, *Chamblis*, for $300, promising that if the Plaintiff would repay him on the 20th of June following, he, *Hylton*, would deliver up the bond, and that *Hylton* gave the Plaintiff an instrument in writing to that effect, stating at the same time, that if the Plaintiff did not thus repay him, he should exact the amount of the bond—to which the Plaintiff assented, and promised either to pay the $300 by the time limited, or to pay the amount of the bond at its maturity.

The Defendant denied all knowledge of the certificate given by *Loyd* to the Plaintiff, respecting the age and pedigree of the horse, and denied that *Loyd* was authorized to represent the horse as of the age of eight years.

The Defendant *Hylton*, in his answer, admitted the sale of the horse to the Plaintiff by *Loyd*, and that the bond was left with him for collection—he stated, that up to the month of May after the sale, he never had seen the Plaintiff—that in that month *Chamblis* came to his house, endeavouring to raise money, saying that an execution was then out against his property, which would be sold unless he could raise $300, and proposed, that he, *Hylton*, should lend him that amount—that he, *Hylton*, proposed going to the house of the Plaintiff, from whom the money might probably be obtained—that while they

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were at the Plaintiff's house, *Chamblis* and the Plaintiff had much conversation, which he did not overhear—that after it was over, the Plaintiff informed him, *Hylton*, that if he had $300 he could take in his bond of $400, and requested him, *Hylton*, to lend him that sum, which was refused, the Defendant stating, that if he loaned money to either of them, it must be to *Chamblis*, with whom he was acquainted—that upon the repeated importunity of the Plaintiff, he agreed to meet at his, *Hylton's*, house, the next day—that upon their meeting, he still refused to lend the Plaintiff any money, as he was utterly ignorant of his circumstances—the Plaintiff then insisted upon his purchasing the bond of *Chamblis*, stating most positively, that he would repay him in ten days—upon which the Defendant did advance the money to *Chamblis*, took an assignment of the bond, and executed to the Plaintiff the instrument already set forth—he denied positively, that any deduction from the bond, on account of a fraud in the sale of the horse by *Loyd*, was mentioned to him, or that he knew of any complaint on that account before his purchase, and averred, that in several conversations between him and the Plaintiff, before and after the expiration of the twenty days limited for the repayment of the money lent, the Plaintiff never, in any form, objected to the bond, on account of any fraud in obtaining it, but constantly stated his willingness to pay the $400, unless he made the payment of $300 by the time limited in the instrument, given him by the Defendant.

Upon these answers, the injunction was retained until the hearing, and replications were filed. No testimony was however taken; and after the cause had stood in the Court below on this order, for several terms, it was set for hearing, upon the bill and answers, and removed to this Court.

Nash, for the Plaintiff.

No Counsel appeared for the Defendants.

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RUFFIN, Judge.—The point, upon which the Plaintiff's counsel has put this case, does not arise. There is no usury, even if it be taken for granted, that the advance of the $300, was by way of loan from *Hylton* to *Moore*. For wherever the debtor, by the terms of the contract, can avoid the payment of a larger by the payment of a smaller sum at an earlier day, the contract is not usurious, but conditional; and the larger sum becomes a mere penalty. To constitute usury, the obligation to pay more than the legal rate of interest must be absolute upon the face of the transaction. Now regarding the assignment of the bond, and the instrument in the nature of a defeazance, given by *Hylton* to *Moore*, all as one transaction—as we must do, when we treat the advance of the money as a loan, and these papers as securities—they show the true debt to be $300, to be paid on the 20th of June under penalty of $400.—If this were usury, every penal bond would be void.—Nor is there usury as between *Moore* and *Hylton*, upon the score of the discount allowed by *Chamblis*; that is, taking the transaction to be a sale of the bond by *Chamblis*. For a contract good in its creation is not avoided by a subsequent usurious agreement. The receipt of the unlawful interest subjects the receiver to the penalty; but the validity of the security is not impaired thereby.

But the Plaintiff is as clearly entitled to be relieved from the $ 100, regarding it as a penalty, as he would be on the score of usury, did that exist. If there was a loan by *Hylton* to *Moore*, only the money advanced and interest can be now exacted, whatever the form of the securities may be. The excess beyond that would be either usurious interest or a penalty; in either case the Court would relieve.

It does not appear distinctly from the framing of the bill, whether the relief is put upon that ground or upon that of the fraud in the sale of the horse, and the subsequent compromise between *Moore* & *Chamblis*. It is manifest, that those

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two cases can have no connexion with each other, so as to create an equity for the Plaintiff. For it is immaterial, what was the character of the dealings between *Moore* and *Chamblis*, if in fact the money was lent by *Hylton* to *Moore*; for that is a new and independent contract.—It is to be regretted, that pleaders do not place the equity of their clients upon distinct statements, calculated of themselves to support it, so that the ground of the relief might stand out visibly to the Court. Looseness and confusion in stating the Plaintiff's case often embarrass the Court, and defeat the relief by not drawing from the Defendant distinct and proper answers. But it is unnecessary to pursue these considerations further, since the cause must be decided against the Plaintiff upon other points.

For allowing the bill to be duly framed, and to stand in the alternative, that there was a loan to *Moore* directly, and that the assignment of the bond was merely a mode of securing the repayment; or that *Loyd* was guilty of a deceit in the sale of the horse, and that *Chamblis* agreed to deduct $100, as the valued damages on that account, and that *Hylton* purchased the bond afterwards with notice thereof: in either aspect, the bill must be dismissed, not for want of equity, but for want of evidence. The Plaintiff's equity upon the first point has already been considered. That on the second head is equally clear—taking the facts for granted. That they are true is most probable. For it is almost impossible to suppose, that *Loyd* should be sent off by *Chamblis* to make sale of a covering horse, without any instructions to the material fact of his age; that *Chamblis* should have felt it necessary to hold his conversations with *Moore*, upon the simple matter of a speedier payment of the bond, in private; that *Moore's* complaint of the fraud should not have entered at all into the agreement for the deduction; that *Chamblis* should have entirely concealed from his particular friend *Hylton*, then his companion at *Moore's*, and his host that night, those parts

of the conversation, which concerned *Moore's* grievance; and that the agreement given in writing by *Hylton*, to receive $300, had no reference to the defect in the horse, and *Chamblis'* stipulation to abate for it. Yet such is the tale in the answers; which deny altogether and directly the fact of the loan; deny the fraud by *Loyd*; do not admit his certificate; admit *Chamblis'* agreement to deduct $100, but attribute it altogether to his pressure for money, which induced him to allow that heavy discount for prompt payment; admit the written instrument, charged to have been given by *Hylton*; but say, that it was a mere bounty, for that he refused to lend the money to *Moore*, but bought the bond from *Chamblis*. It would be hard to believe witnesses who deposed to such a case; much more the answers of Defendants. The Court did therefore very right, to refuse to dissolve the injunction upon the coming in of the answers. Upon that occasion, the answers could be scanned; and altho' their contents are generally to be deemed true, yet any evasion in not responding to the material charges of the bill, or an extreme improbability in the accounts given by the Defendants of the transaction, might well prevent the Court acting on them. Upon a motion to dissolve, the Defendant is the actor. His statement must not therefore shock credulity itself. In such a case, the Court will keep up the injunction, to allow the Plaintiff an opportunity to except to the answer; or let the case stand for proofs. For upon a replication to the answer, the Defendant must prove the whole of his case, and his answer is only evidence of it, so far as it is responsive to the Plaintiff's charges.

Here no proofs have been taken on either side; and the Plaintiff has overruled his own replication, by setting the cause down for hearing *upon bill and answers*. What before we could not listen to, now becomes quite credible, because the Plaintiff expressly admits the truth of it upon the record. The answers deny positively the loan;

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do not admit the fraud, and deny any agreement to abate therefor; and assert a sale of the bond by *Chamblis* to *Hylton*. Upon the answers, which the Plaintiff compels us to receive as true in *all* their parts, the case is this: a creditor agrees, without any consideration, and purely as a bounty, to remit to his debtor a portion of his debt. Such a promise is obligatory, neither at Law nor in Equity.

HENDERSON, Chief Justice, concurred.

HALL, Judge, *dissentiente*.—From the answer of *Chamblis*, it is more than probable, that a fraud was practised upon *Moore* by *Loyd*, as to the age of the horse he sold him, as the agent of *Chamblis*. And I collect it from that part of *Chamblis*' answer, which says, that he had not authorized *Loyd* to state that the horse was eight years old, *nor did he know whether Loyd knew the age of the horse or not*. The extraordinary feature of this transaction is, that he should entrust an agent with the sale of the horse, who was ignorant of his age. But the enquiry need not be pursued, as this answer is not evidence against *Hylton*.

Hylton admits, in his answer, that the purchase of the horse was the consideration of the bond, which *Loyd* lodged with him for collection: that *Chamblis* afterwards came to his house, and wished to borrow three hundred dollars from him, though he does not state that he offered him the bond for that sum. Had he purchased it at that time, for that sum, and without any knowledge of any fraud committed by *Loyd*, the bond then not being due, the Plaintiff would have been compelled to discharge it. It appears from *Hylton*'s answer, that they went to the house of the Plaintiff the next day; and whether on that day *Hylton* became the creditor of the Plaintiff, by contract, made on that day and afterwards at *Hylton*'s house, or whether he became such merely by

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purchase of the bond from *Chamblis*, and taking an assignment of it, is the important question between the parties. *Chamblis* denies, in his answer, that he made any deduction from the amount of the bond, on account of any fraud charged to have been committed by *Loyd*; and *Hylton* denies, that he knew that any charge of fraud was alleged against him. Under these circumstances, it is a little strange, that *Hylton* did not purchase the bond before they went to the house of the Plaintiff. However it appears, that when at the house of the Plaintiff, he, the Plaintiff, wished to borrow of *Hylton* $300, saying, he could take in his bond for that sum, *Hylton* declined, saying, he was unacquainted with his circumstances, and that if he loaned it at all, it must be to *Chamblis*, with whom he was acquainted. However, he says, upon repeated applications of the Plaintiff, he requested him to come to his house the next day, when they would consider further of the proposition: that upon this meeting at his house the next day, he still declined loaning the money to the Plaintiff, because his circumstances were unknown to him: that the Plaintiff then insisted upon his purchasing the bond of *Chamblis*, and that if he would do so, he would return the $300 in ten days. He, the Defendant *Hylton*, states, that, relying upon the Plaintiff's representation, and depending upon his punctuality, he did purchase the bond of *Chamblis*, and took an assignment of it. He also admits, that he entered into a written contract with the Plaintiff, by which he obliged himself to deliver to the Plaintiff his bond of $400, on the payment of $300 by the 20th of June, 1820. I think certainly, that *Hylton* could have purchased the bond from *Chamblis* for $300, without having any thing to do with the Plaintiff. And it may be asked, why did he not do this, rather than make a worse bargain with the Plaintiff? I can answer no otherwise, than by supposing that *Hylton* thought he would make a safe contract, by getting Plaintiff's acknowledgment of the goodness of the bond;

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and that he would still get the full amount of it, as the Plaintiff would not return the $300 by the time stipulated; and if he did, he would then receive no injury, because in that case, he would receive his principal and interest. Another strong reason, why he wished the assignment of the bond as security for his debt, was, that *William Moore* was a surety to the bond. It is very remarkable, that from the time that *Hylton* and *Chamblis* went to the house of the Plaintiff, until the $300 was advanced at the house of *Hylton*, there was no contract made, or negotiation carried on between *Hylton* and *Chamblis*. The assignment of the bond was in consequence of the bargain made by Plaintiff and *Hylton*.

It may now be asked, what was the contract of the Plaintiff and *Hylton*, after the assignment of the bond to the latter. The contract was, that the former borrowed of the latter $300, and by his consent, and at his request, took as a security for it the Plaintiff's bond for $400. As that was the sum borrowed, that sum with interest ought to be paid, and an injunction ordered as to the $100.

It is said, that the Plaintiff should pay $400, because the Defendant denies all fraud, and his answer is to be taken as true. My reply is, that the bond had several months to run before it became due. *Chamblis* was anxious to raise money, because an execution was pressing him at home. This he stated to *Hylton*, as he admits. He, *Chamblis*, offered to take $300 for the bond. This caused the Plaintiff to be solicitous to borrow the money from *Hylton*. I think he did borrow it, and therewith purchased the bond, which *Hylton* took as his security for his debt of $300. It is true, Plaintiff told *Hylton*, if he did not return the money in so many days, he would pay (or forfeit, as I say) the amount of the bond. But this, as between the Plaintiff and *Hylton*, was a penalty, which the latter thought would be his gain. But being a penalty, the law will not permit him to recover it. He ought to be contented with the money loaned, and

interest upon it. The $400 was given up by *Chamblis*, for an advance of $300, which Plaintiff borrowed of *Hylton*, and paid him in advance, before the bond became due, to relieve him from his then embarrassed situation. The gain of $100 was the Plaintiff's. I think there is enough to be collected from *Hylton's* answer to come to that conclusion. Could we look into the whole transaction as it took place, it is more than likely it would be seen, that it was just that it should be so.

PER CURIAM.—Let the bill be dismissed with costs.

William Keaton & Elizabeth his wife
v.
Enoch Cobb & Mary his wife,
} From Wayne.

A fraudulent trustee, who, pending a litigation between him and his *cestui que trust*, purchases the trust estate at a Sheriff's sale, acquires thereby no title, and the Sheriff's deed to him can stand only as a security for the amount of his bid.

Where the *cestui que trust* incurs costs at law, in defending a title purely equitable, against his trustee, and does not at once come into the proper forum for redress, he cannot in Equity recover his own costs at law; but he is entitled to a repayment of the amount of costs paid to the trustee.

The allegations of the bill were, that in the year 1816, the Plaintiff, *Elizabeth*, and the Defendant, *Mary*, being sisters and unmarried, purchased jointly a lot of ground in the town of Waynesborough, and contributed equally to the payment of the purchase money—that on account of the nonage of the Plaintiff, *Elizabeth*, the deed for the lot was made to the Defendant, *Mary*, who was of full age—that at the time of the purchase, the lot was unimproved, and the sisters being desirous of procuring a home for themselves, as well as for their parents who

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were old and infirm, agreed with their father, *John Sasser*, that if he would assist in building a dwelling-house and otherwise improving the lot, he and his wife might live in it during their lives—that accordingly, the sisters procured at their joint expense the necessary materials, and a house and out-houses were erected by them, with the assistance of their father—that their father occupied the premises until his death—after which, their mother and themselves lived together in great harmony, until the marriage of the Defendant, *Mary*, with the Defendant, *Cobb*—that as soon as the Plaintiff, *Elizabeth*, heard of the treaty for that marriage, fearing some difficulty with the intended husband, she applied to her sister to execute a deed to her for her undivided moiety—that her sister then acknowledged the right of the Plaintiff, *Elizabeth*, in the fullest manner, and stated to her, that the husband of the Defendant could not deprive her of possession of the lot, and that, with this assurance, the Plaintiff being perfectly satisfied, no deed was executed by the Defendant, *Mary*—that soon after the intermarriage between the Defendants, the Defendant, *Cobb*, pretending to be ignorant of the agreement between his wife and the Plaintiff, *Elizabeth*, and between them and their parents, commenced an action of ejectment; and after the Plaintiffs had made every defence in their power, succeeded in obtaining a verdict and judgment, and was proceeding to execute a writ of possession. The death of the mother, and the intermarriage of the Plaintiffs, pending the ejectment, were then averred. An injunction, and a decree for the repayment of the costs at law, were prayed.

The Defendants denied every allegation in the bill, and as a distinct defence, the Defendant, *Cobb*, averred, that since the controversy respecting the lot had arisen, he had, at a Sheriff's sale, purchased whatever title the Plaintiff, *Keaton*, had thereto, for $8 50, under a judgment and execution against him.

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Upon the coming in of the answers, the injunction which had been granted on the filing of the bill, was dissolved, and the Defendant, *Cobb*, put in possession.

Many depositions were read at the hearing, by which every allegation of the Plaintiffs was fully supported.

Badger & Mordecai, for the Plaintiffs.

W. H. Haywood, for the Defendants.

RUFFIN, Judge.—The agreement charged in the bill, for the joint purchase of the lot in dispute by the two sisters, and the payment of the purchase money and of the cost of putting the buildings on it by them equally, tho' denied in the answer, are facts proved beyond a doubt by the depositions. A conveyance to the Plaintiffs of one half must therefore be decreed.

It is however stated, in the answer, that *Cobb* has purchased at Sheriff's sale the estate of *Keaton*, the husband; and it is insisted, that precludes the Plaintiff from any relief. At most, that purchase would extend only to the life estate of the husband, and would not affect the fee of the wife. But even that effect cannot be allowed to it.—Here is a trustee, who denies the right of his *cestui que trust*, and brings an ejectment to evict him; and during the litigation and doubt cast on the title by the trustee himself, purchases under execution at a price enormously inadequate. To allow him to hold under such a title would be to encourage iniquity. The Sheriff's deed can only stand as a security for what the Defendant advanced upon the execution.

It does not appear, whether the costs of the suit at law have been paid. It is to be presumed they have, as the injunction at first granted, was dissolved upon the coming in of the answer. The Plaintiffs now ask for an account of those costs, and to have refunded what they have paid to the Plaintiffs at Law, and to recover their own costs at Law. Certainly they must get back the costs of the ejectment, paid to the Plaintiffs in it. No-

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thing can be plainer, than that *Cobb* and wife ought not to have used their legal title in that way, and they must be content to do it at their own expense; for the Plaintiffs never denied their title to a moiety. In this particular case, the gross oppression, attempted by the Defendants, prompts us to go as far as we can to make them pay all the costs, wherever any can be found.—But we cannot yield to our feelings against principle. The title of the Plaintiffs was not legal, tho' a clear one in this Court. If a party in that situation chooses to contend at law, without resorting at once to the forum, in which alone he can properly be redressed, he must not expect to recover his costs, unless he succeeds at law. He chooses his game, and must put up with his luck. If it was wrong in the Defendant to bring ejectment, he must bear the burden of the costs incurred by him. And it being equally wrong in the Plaintiff to rely upon a bad title, in a Court which could not investigate and sustain his real rights, he must likewise be out of pocket the money he has spent in that fruitless defence.

It is much to be regretted, that ignorant and poor people should be advised to such long, expensive and fruitless litigation; for I dare say, they knew no better. But we cannot help them, without holding out an encouragement to others to keep at law for the sake of it, instead of putting their cases at once upon the merits.

As to the rents and profits, it is to be remarked that by the contract, charged in the bill and proved by the witnesses, between *John Sasser*, the father, and his two daughters, the father and mother were to enjoy and occupy the premises during their lives as a home. This was in consideration of his erecting the houses; which he did. It is not a question now, how this might be treated by the father's creditors. But as between the parties, there can be no rent during the occupation by either of the parents. From that period however, each sister is liable for rent received by her, or for a reason-

able rent during their own exclusive occupation respectively; as to which an account must also be taken.

PER CURIAM.—Declare that the agreement between the Plaintiff, *Elizabeth*, and the Defendant, *Mary*, for the joint purchase of the lot in dispute, and for the erection of houses on it at their joint expense, as charged in the bill, is fully proved. Declare further, that said *Elizabeth* paid one half of the purchase money for said lot, and of the expenses of erecting buildings on it, and that she is entitled to one undivided half of the said lot: And decree, that the Defendants convey to the Plaintiff, *Elizabeth*, one undivided moiety of the said lot, with the appurtenances, in fee-simple. And let it be referred to the Clerk, to take an account of such monies as may have been paid by the Plaintiffs to the Defendants, as the costs of the suit at law, and let him state any balance due thereon: and order, that the Defendants desist from proceeding on their execution for such balance, if any there be: and order the Plaintiffs to be entitled to recover back any such costs as the Defendants may have received, as aforesaid: And let it be referred to the Clerk to take an account of the rents, received by either of the parties, for the premises; and also of the reasonable annual value of the said lot, while in the occupation of either of the parties, since the death of *Elizabeth Sasser*, the elder.

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Christian L. Benzein et al.
v.
Jesse Robenett et al.
} From Wilkes.

On the hearing of an original bill, in the nature of a supplemental bill and bill of revivor, depositions taken in the original suit may be read.

In Equity, upon a bill by the mortgagor to redeem, he shall have relief, though at law, the estate of the mortgagee is barred; as upon a disseisin, and seven years possession with colour of title.

This cause was a branch of that of the same Plaintiffs against *William Lenoir* (*reported ante p.* 225). It set forth the same title and the same facts. The two infant children of *Montgomery*, who pending the former suit had married, were, with their husbands, *Montfort Stokes* and *James Wellborn*, made Plaintiffs. The Defendants claimed under *Mary Gordon*, who was a Defendant to the original suit, as to whom it had abated. The present bill prayed a revivor, as to those claiming under *Mary Gordon*, and in other respects, the same relief as that sought by the original bill.

The only additional fact appearing on the pleadings in this case was, that upon payment of the mortgage debt due the *Unitas Fratrum*, the residue of the term created by the deed of *Hugh Montgomery*, of July 23, A. D. 1778, to *John Michael Graff*, had been assigned to *John Brown*, the younger, the executor of *John Brown* the elder, the surviving trustee and executor of *Montgomery*.

At June term, 1829, the case was argued by *Ruffin*, then at the bar, and *Badger*, for the Defendants, upon a motion to suppress the depositions taken in the original case, which were filed in this, and by *Seawell & Gaston* for the Plaintiffs. And at this term, it was, on the hearing, argued by the same gentlemen, with the exception of his Honor Judge RUFFIN.

HALL, Judge.—The lands in question were part of a tract originally granted to *Henry Cossart*, from whom they descended to *Christian Frederic Cossart*, his son and heir at law. He, in the year 1772, made a power of attorney to *Frederick W. Marshall*, either to sell the lands himself, or to appoint some other person attorney in fact for that purpose. The said *Frederick W. Marshall* did not sell or dispose of the lands, but nominated and appointed *John Michael Graff*, attorney in fact of the said *Cossart*, in the year 1774, with general powers, as he was authorized to do. The said *Graff*, in the year 1778, sold the said lands, as the agent of the said *Cossart*, to *Hugh Montgomery*, for the sum of £2,500. In the same year, *Hugh Montgomery* mortgaged the same lands, for the term of five hundred years, to the said *Graff*, to secure the debt to him, as agent of the *Unitas Fratrum*; he died, and *Fragott Bagge* became his administrator, and in the year 1784, assigned the said term to *F. W. Marshall*, agent of the *Unitas Fratrum*. He devised the lands to *Christian L. Benzein*; he died, and the mortgage term came to the Plaintiffs, his executors.

It further appears, that *Hugh Montgomery* conveyed the land in question, after the date of the mortgage, to *John Brown* and others, trustees for the benefit of his two female infant children, since married to *Montfort Stokes* and *James Wellborn*, who are also Plaintiffs.

The Defendants claim under grants, issued by the State for the same lands, but bearing date posterior to the deed executed to *Montgomery*, and posterior to the deed of mortgage given by him, before noticed.

It appears, that *Mary Gordon* was sued for these lands in the original suit, spoken of in the bill, but that the suit, as to her, abated by her death; and was not revived, as to those, who claim under her. The present bill is brought against such persons; and considering it to be an original bill, in the nature of a supplemental

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bill, and bill of revivor, I think it is not improper to read the depositions taken in the original suit; though, in the view I take of the case, I shall make no use of them.

The Defendants allege, that the Plaintiffs have no grounds for coming into a Court of Equity; that if they have any right to the lands in question, they should assert it at Law. In the former suit, I attempted to give the reason, why a suit had not been brought at Law. (*Ante p.* 263). But it may be assumed, that the mortgagee might have brought a suit at Law, and has failed to do so; and that the legal title being in him, he is the only person who could bring such suit; and that not having brought such suit, he is barred by the statute of limitations. It does not follow of course, that the rights of the mortgagor are concluded by the same bar. He has twenty years to redeem, or as long as the mortgage is recognized by those concerned. (5 *Bac. Abr.* 94).

I have no inclination, either to repeat or unsay, what appeared to me, in the former suit, to be the correct principle of decision. I will only add to it a few remarks.

It is argued for the Defendants, that they have had a seven years actual adverse possession, under a colour of title—a grant from the State. That may be true, and still their title is not good. It is not true, as a universal proposition, that such a possession gives a title. It only gives title, in the words of the act, against such persons, whose rights or titles shall descend or accrue. Thus, if an estate is made upon condition, that the feoffor shall re-enter, provided he pays or tenders a certain sum of money, on a certain day, twenty or thirty years afterwards. If the money shall be paid or tendered on the day, he may enter, and regain his estate. In this case, the feoffee might be in possession twenty or thirty years, but it would not give him a fee-simple. So if there is a tenant for life, remainder in fee, and tenant for life makes

a feoffment in fee, the remainder man may presently enter for the forfeiture. But if he does not enter for seven, or twenty years, provided the tenant for life lives so long, he may afterwards, upon the death of the tenant for life, enter by virtue of his remainder, which has fallen into possession. (5 *Bac. Abr.* 830). Yet the feoffee of tenant for life, although peaceably possessed during the life of tenant for life, acquires no fee-simple, because the right of the remainder man had not accrued during that time.

Again, and which is more in point, if a man disseises a mortgagee, and levies a fine, and five years pass after the proclamations, by which the mortgagee is bound, yet if the mortgagor pay, or tender the money due on the mortgage, he has five years to prosecute his right, by the second saving of the statute of 4 *Hen.* 7, *c.* 24; because his title did not accrue till payment or tender of the money, by condition made upon cause, or matter before the proclamations, viz. by the condition made before the fine. (*Plow.* 373). In this case, we see a person holding an estate in the *post*, altogether unconnected in privity with the mortgagee, nay, holding an estate under a fine levied by the disseisor of the mortgagee, obliged to yield his title to the mortgagor, when the time comes, be it long or short, when the money becomes due, according to the condition in the mortgage. It is true, if the money was not paid at the day, according to the condition, the estate became absolute at law. (*Co. Lit.* 221, 222). But Courts of Equity consider the mortgagor to be the owner of the land, which is only a pledge for the money lent, and will sustain the right of redemption in the mortgagor, against the same persons from whom the estate might have been wrested at law, in case the money had been strictly and legally paid or tendered, according to the condition. (*Hard.* 465. *Co. Lit.* 35, *note* z). It would seem to make but little difference with the possessor of the land, claiming against the mortgagee, if he must be disturbed, whether it is by the mortgagee, or by the mortgagor. There

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is this difference; the mortgagee can only sue at Law, and that within seven years. The mortgagor, generally speaking, has twenty years, or in some cases longer, if the mortgage shall be recognized as such by the parties. (*Thom. Co. Lit.* 41, *note* z). In the present case, the existence of the mortgage is acknowledged by the parties, and must be admitted by all.

But it is stated in the bill, that the remainder of the mortgage term has been surrendered to *John Brown* the younger in consequence of the money being paid, which was due on it; and it is insisted for the Defendant, that *John Brown* has a remedy at Law. It may be answered, that if there is an end of the mortgage, it is of very recent date before the filing of the present bill; that *John Brown* has not thought proper to sue, and that the Plaintiffs have no remedy at Law; that although the mortgage is now extinct, it stood in the way until very lately, and prevented a suit at Law; that the legal right to the land is now in *John Brown* the younger, and that a beneficial trust was created in the Plaintiffs, under the deed of *Hugh Montgomery*, made to *John Brown* the elder and others, trustees &c. and and also under the will of said *Montgomery;* that since the mortgage term has become extinct, no time has elapsed, that will impair the equitable rights of the Plaintiffs, or interpose an obstacle to redress for it in this Court, against those trustees, and also against the other Defendants. I therefore think the female Plaintiffs are entitled to a decree, to be based upon the deed from *Montgomery* to *John Brown* and others, trustees, and also upon *Montgomery's* will.

Per Curiam.—Decree accordingly.

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John H. Alley et al.
v.
Richard Ledbetter.
} From Rutherford.

A bill, the allegations of which are directly denied by the answer, and supported by one witness only, without corroborating circumstances, will be dismissed.

After a failure at Law, the party cast cannot come into a Court of Equity, merely because the verdict is unjust; unless the matters alleged in Equity do not constitute a defence at Law.

Where a discovery in aid of a defence at Law is sought from the conscience of the Defendant, it ought to be obtained pending the suit at Law.

Discovery and relief are never given after a trial at Law, where the matter averred was available at Law, unless the party seeking it avers and proves, that he was ignorant of the defence or evidence, at the time of the trial.

The Plaintiffs were the sureties of *Frederick F. Alley*, late Sheriff of Rutherford, and in their bill alleged, that the Sheriff having a *fieri facias* against the Defendant, had sold one of his negroes to satisfy it—that the sale of the slave produced the sum of $207 83, over and above the amount due upon the execution, which the Defendant then might have received of the Sheriff, but which he then lent him upon his, the Sheriff's, individual responsibility.

That the Defendant had sued the Plaintiffs at Law, for the said sum of $207 83, without joining the Sheriff—that although they had heard of the lending by the Defendant to the Sheriff, they knew of no witness by whom the same could be proved on the trial at Law—but that since the judgment in the action at Law, they had discovered a witness, by whom they could prove a loan of the surplus, over and above the amount due on the execution. The Plaintiffs prayed an injunction, to restrain the Defendant from issuing execution upon his judgment.

The Defendant, by his answer, denied every allegation in the bill, as to his lending, or forbearing in any way, to *Alley*, the Sheriff, the surplus in his hands, over and above the execution mentioned in the bill, and insisted

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that he was needy, and had constantly, but without effect, urged its payment.

Gray Crowe, the only witness examined by the Plaintiffs, as to the main allegation in their bill, swore, that he was at the house of *Frederick F. Alley*, in September, 1820, when the Defendant came there, and asked *Alley* to pay him the surplus in his hands, over and above the amount of an execution, under which a negro of his, *Ledbetter's*, was sold—that *Alley* produced and counted the money, and then asked *Ledbetter* for the loan of it; upon which, *Ledbetter* immediately lent him the amount.

No Counsel appeared for the Plaintiffs.

Hogg, for the Defendant.

RUFFIN, Judge.—I think the bill ought to be dismissed, on two grounds. The one is, that the answer directly and positively denies the loan to the Sheriff, and the contrary is proved by only one witness, *Gray Crowe*. If there were nothing particular to be said of his deposition, it is the constant course of the Court to refuse a decree upon the testimony of a single witness, unsupported by circumstances, against the answer, directly responsive to the bill. But it is almost impossible to believe the witness, without the contradiction. The transaction deposed to is, to say the least of it, most extraordinary. That a needy man, whose negro had been sold under execution, and who had the surplus money offered to him, should loan it to the Sheriff, without taking any security therefor, and this after application made by him for the money, cannot readily be credited, without the testimony of more than one witness, uncorroborated in any manner.

But besides this, the Plaintiffs come too late here. They ought to have filed their bill of discovery, pending the suit at law. After a trial there, which they resisted upon the evidence in their power, they cannot come here for a new trial, merely because the verdict was unjust.

If the matters alleged be no defence at Law, that is a different case; for then the discovery would be of no avail. But if the discovery now sought might have availed as a defence at Law (which is the case here) then the only excuse for not proving it at Law, either by witnesses or by a discovery from the Defendant, is, that the fact was not then within the knowledge of the party. The Plaintiff has no right to discovery and relief in this Court, when by asking the discovery here in due time, he might have had the relief at Law: for that would be altogether changing the forum, by which facts are to be found in the ordinary jurisdiction of the Courts. A jury is primarily to pass upon legal defences; and no transfer of the jurisdiction ought to be allowed, which does not arise from necessity. Here the Plaintiffs admit, they had heard of the loan before the trial at Law. Why then did they not seek a discovery? Can any reason be given, except that they wanted to find where the case pinched?

This however, it may be said, applies only, where the bill seeks relief upon the discovery in the Defendant's answer solely—where the Plaintiff puts himself on the Defendant's conscience, and not where the relief is prayed upon the strength of evidence newly discovered. In the latter case, the party relies upon his proof. I admit the difference. But it will not help these Plaintiffs; because it does not appear in the evidence, when they came to the knowledge of what the witness knew. As I have just said, Equity does not interfere merely to prevent injustice; but only upon the ground, that the party had it not in his power to have justice done him. He had that power, if he knew of the existence of the witness, and what he would swear. It is therefore, a material allegation, in every such bill, that the Plaintiff was ignorant, at the time of the trial at Law, of the existence of the fact, or of the witness by whom he can now prove it. And like every other material allegation, it must be proved. This may be always done, at least as to this

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purpose, by examining the witness as to the period of his communicating to the party his knowledge of the fact, as well as by examining him as to the principal point. Here nothing of the sort has been done. *Crowe* merely proves the loan by the Defendant, and does not say one word why he kept it secret during the suit at Law, nor when he told the Plaintiffs. For any thing we can know, he was purposely kept back, lest a Rutherford jury might not think fit to credit the very singular account he gives of the transaction.

PER CURIAM.—Let the bill be dismissed with costs.